(1)

No. 88-6677-CFH
Status: GRANTED
CAPITAL CASE

Title: Horace Butler, Petitioner
v.
Kenneth D. McKellar, Warden, et al.

Docketed:
February 24, 1989

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Blume,John H.

Counsel for respondent: Zelanka,Donald J.

Entry	Date	Note	Proceedings and Orders
1	Feb 24 1989	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Mar 27 1989		Order extending time to file response to petition until April 8, 1989.
5	Apr 8 1989		Brief of respondents Warden McKellar, et al. in opposition filed.
6	Apr 12 1989		Reply brief of petitioner Horace Butler filed.
7	Apr 13 1989		DISTRIBUTED. April 28, 1989
9	May 1 1989		Petition GRANTED.
			**********
11	May 9 1989	G	Motion of petitioner for appointment of counsel filed.
10	May 12 1989		DISTRIBUTED. MAY 18, 1989. (MOTION FOR APPOINTMENT OF COUNSEL).
12	May 22 1989		Motion for appointment of counsel GRANTED and it is ordered that John H. Blume, Esquire, of Columbia, South Carolina, is appointed to serve as counsel for the petitioner in this case.
13	Jun 8 1989		Joint appendix filed.
15	Jun 8 1989		Order extending time to file brief of respondent on the merits until July 6, 1989.
16	Jul 5 1989		Brief of petitioner Horace Butler filed.
18	Aug 3 1989		Order extending time to file brief of respondent on the merits until August 12, 1989.
19	Aug 12 1989		Brief of respondents James Aiken, Warden, et al. filed.
20	Aug 25 1989		CIRCULATED.
21	Aug 28 1989		Record filed.
		*	4 vol., USCA 4
22	Aug 28 1989		SET FOR ARGUMENT MONDAY, OCTOBER 30, 1989. (3RD CASE)
23	Sep 6 1989	G	Application (A89-196) to extend the time to file a reply brief from September 11, 1989 to September 26, 1989, submitted to The Chief Justice.
24	Sep 7 1989		Application (A89-196) granted by the Chief Justice extending the time to file until September 26, 1989.
25	Sep 21 1989		Reply brief of petitioner Horace Butler (TBP) filed.
26	Oct 3 1989	X	Reply brief of petitioner Horace Butler filed.
27	Oct 30 1989		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

88-6677 (2)

Supreme Court, U.S.
FILED
FEB 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-

HORACE BUTLER,

Petitioner,

v.

JAMES AIKEN, WARDEN, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA, T. TRAVIS MEDLOCK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I.

Did the Court of Appeals violate the rule announced in Shea v. Louisiana by denying petitioner the benefit of Edwards v. Arizona, despite the fact that petitioner's conviction was not yet final on direct review at the time Edwards was decided?

II.

Did the Court of Appeals majority misread Arizona v. Roberson as creating a "new" rule of constitutional law?

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1. This Court's decision in Arizona v. Roberson did not create a new rule of law as it merely applied the bright-line rule established in Edwards v. Arizona to a different factual setting 8

2. Because petitioner's case was pending on direct appeal at the time that this Court decided Edwards v. Arizona, the Court of Appeals incorrectly determined that the "bright-line" rule established in Edwards did not apply retroactively in this case. 10

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-

HORACE BUTLER,

Petitioner,

v.

JAMES AIKEN, WARDEN, AND
THE ATTORNEY GENERAL OF
SOUTH CAROLINA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Horace Butler, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the District of South Carolina, Butler v. Aiken, C/A. No. 86-1093-3 (D.S.C. June 9, 1987), denying Butler's petition for a writ of habeas corpus is unreported, and may be found at J.A. 1606. A copy of the District Court's opinion is attached to this petition as Appendix A. The initial panel opinion of the United States Court of Appeals for the Fourth Circuit, affirming the denial of a writ of habeas corpus, is reported as Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988), and is attached to this opinion as Appendix B. The order of the Court of Appeals denying rehearing and rehearing en banc is unreported. Butler v. Aiken, No. 87-4004 (4th Cir. June 15, 1988). The order of the United States Court of Appeals for the Fourth Circuit modifying the panel's decision on reconsideration of the order denying rehearing, and denying rehearing en banc, with five judges dissenting, is reported as Butler v. Aiken, No. 87-4004 (4th Cir. Dec. 12, 1988). A copy of the order modifying the panel opinion and the dissent from the

denial of rehearing is attached to this petition as Appendix C.[1]

JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing with suggestion for rehearing en banc was entered December 2, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Petitioner was convicted and sentenced to death for the murder of Pamela Lane. A key piece of evidence against him was his confession. A panel of the United States Court of Appeals for the Fourth Circuit found that petitioner's confession was obtained in violation of the Fifth Amendment principles of Edwards v. Arizona, 451 U.S. 477 (1981), and Arizona v. Roberson, ___ U.S. ___, 108 S.Ct. 2093 (1988). However, the court denied habeas corpus relief on the sole ground that Roberson should not be applied retroactively to petitioner's conviction, which had become final on direct review after Edwards but before Roberson. The pertinent facts are as follows.

Four Charleston County police officers arrested petitioner on the evening of August 30, 1980, on a charge--later dismissed--unrelated to the murder of Pamela Lane. The officers brought petitioner to the county jail, where he remained until his bond

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[1] The opinion of the South Carolina Supreme Court affirming Petitioner's conviction and sentence of death is reported as State v. Butler, 277 S.C. 452, 290 S.E.2d 1, cert. denied, 459 U.S. 932 (1982). The South Carolina Supreme Court opinion affirming Petitioner's conviction after granting a petition for writ of certiorari requesting review of the denial of petitioner's application for post-conviction relief is reported as Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), cert. denied, 474 U.S. 1093 (1986).

hearing late the following evening. Prior to the hearing, petitioner invoked his right to counsel by retaining a local attorney, W. McAlister Hill. Hill appeared with petitioner at the bond hearing on August 31. petitioner was unable to post bond and was returned to the Charleston County Jail. Hill later testified that he warned the police against any further questioning of his client, but the officers claimed not to remember any such instruction.

A few hours after the bond hearing, at 12:15 a.m. on September 1, the same four officers who had arrested petitioner on the assault charge brought him to the Charleston County Police Headquarters where they initiated an interrogation concerning the murder of Miss Lane. After informing petitioner that they were charging him with the Lane murder, the police officers questioned him for some five hours, during which time they obtained two separate Miranda waiver forms and two different statements regarding his participation in the crime. Both of these statements were introduced against petitioner at his trial. Petitioner was not returned to the county jail until 10:30 a.m., after he had shown police the scenes where the crime took place.[2]

In January, 1981, a Charleston County jury convicted petitioner of murder and sentenced him to death. While petitioner's case was pending on direct appeal to the South Carolina Supreme Court, this Court announced its decision in Edwards v. Arizona, 451 U.S. 477 (1981). Some nine months after Edwards was decided, on February 22, 1982, the South Carolina Supreme Court affirmed petitioner's conviction and sentence of

[2]The state court record also reveals that petitioner functions on the borderline of the mentally retarded range, with a mental age of between seven and eleven, and an I.Q. between the high sixties and the low seventies. When he completed his education at age sixteen, he had just finished the fourth grade. The record also indicates that petitioner's attorney, Mr. Hill, was not informed that the police planned to interrogate his client after the attorney left the bond hearing and petitioner was returned to the county jail. Nor is there the slightest evidence that Hill consented to any such interrogation. In fact, Hill testified in state collateral proceedings that he specifically instructed the police at the bond hearing not to talk to petitioner at all.

death. State v. Butler, 277 S.C. 452, 290 S.E.2d 1, cert. denied, 459 U.S. 932 (1982).

After exhausting his state collateral remedies, Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), cert. denied, 474 U.S. 1093 (1986), petitioner filed a petition for habeas corpus in the District Court of South Carolina alleging, inter alia, that his Fifth Amendment rights under Edwards had been violated by the police officers' initiation of questioning about the murder of Pamela Lane after petitioner had invoked his right to counsel just hours before in connection with the assault charge. The District Court, apparently unaware that petitioner's conviction had not yet become final when Edwards was decided, dismissed his Edwards claim on grounds that he was not entitled to retroactive application of the "bright line" test enunciated in Edwards. J.A. 1640. On appeal, a panel of the Fourth Circuit Court of Appeals acknowledged that the district court's nonretroactivity holding was erroneous. The appeals court nevertheless denied relief, holding that Edwards did not bar police initiation of questioning concerning a charge other than the one for which the suspect had invoked his Fifth Amendment right to counsel. Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988).

Just after the Court of Appeals denied petitioner's request for rehearing and suggestion for rehearing en banc, Butler v. Aiken, No. 87-4004 (4th Cir. June 15, 1988), this Court announced its decision in Arizona v. Roberson, ___ U.S. ___, 108 S.Ct. 2093 (1988). On petitioner's motion for reconsideration, the Court of Appeals requested that the parties submit briefs as to the effect of the intervening decision in Roberson, ___ U.S. ___, 108 S.Ct. 2093 (1988). On December 2, 1988, the panel of the Court of Appeals issued a modified opinion acknowledging that the procedures by which petitioner's statements were obtained were invalid under Roberson. However, the panel adhered to its earlier judgment denying relief on the sole ground that Roberson should not be accorded "retroactive" effect. Butler v. Aiken, No. 87-4004 (4th Cir. Dec. 2, 1988). Rehearing en banc was

denied by a vote of six to five. The dissenting judges filed an opinion which pointed out that the Roberson Court had expressly rejected the suggestion that the holding of that case represented any extension of Edwards. For this reason, according to the dissenting judges, Roberson presented no question of retroactivity, and the invalidity of petitioner's conviction under both Roberson and Edwards mandated that he be granted habeas relief.

HOW THE FEDERAL QUESTIONS WERE DECIDED BELOW

After the respondent unconditionally waived the defense of nonexhaustion of state remedies, J.A. 1499-1500, the United States Magistrate to whom the case was initially referred recommended that relief be denied on petitioner's Edwards claim. The magistrate reasoned that under Michigan v. Mosley, 423 U.S. 96 (1975), the police interrogation of petitioner about the murder was permissible because the questioning focused only on a crime different in time, place, and nature from the first crime for which petitioner had already retained counsel. J.A. 1586. The district court adopted the magistrate's reasoning, and rejected petitioner's reliance on United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir.) cert. denied, ____ U.S. ____, 107 S.Ct. 3240 (1987), a decision granting habeas corpus relief on facts in all material respects identical to those of petitioner's case. The district court concluded that it

> need not consider the propriety of the principles established in Espinoza inasmuch as the underlying ruling in Edwards v. Arizona may not be applied retroactively. Solem v. Stumes 465 U.S. 638 (1984). Petitioner was convicted January 24, 1981. The sentencing phase of his trial was concluded on January 26, 1981. Edwards was decided May 18, 1981.

J.A. 1640.

The original panel decision of the United States Court of Appeals for the Fourth Circuit found that the district court erred in ruling that the "bright-line" rule established by this Court in Edwards v. Arizona did not apply to petitioner's case. The panel concluded that because petitioner's appeal was pending when Edwards was decided, Shea v. Louisiana, 470 U.S. 51 (1985),

mandated that the Edwards rule be applied to petitioner's case. Butler v. Aiken, 846 F.2d 255, 257 (4th Cir. 1988). The panel opinion corrected the district court by stating that although Edwards did not have retroactive effect, it did apply to cases pending on direct appeal at the time Edwards was announced. However, the panel did not believe the "bright-line" rule of Edwards extended to the facts of petitioner's case.

> We fail to see how the actions of the Charleston police could fall within the intent of the Court in Edwards. . . . We see no reason for a different result simply because the custody was continuous.
>
> Properly initiated interrogation on entirely new charges does not intrude into an accused's previously invoked rights but rather offers that accused an opportunity to weigh his rights intelligently in light of changed circumstances. When, as occurred in this case, the accused then freely waives any constitutional right to counsel and provides voluntary statements of an incriminating nature, there is no justification for undermining the search for truth by suppressing those statements.

Id. at 258-59. Therefore, the panel concluded, petitioner's confessions were not obtained in violation of the Fifth Amendment. Id.

The panel subsequently modified its opinion in light of Arizona v. Roberson, supra, which held that the "bright-line" rule of Edwards bars police initiated interrogation following a suspect's request for counsel in the context of a separate investigation. The panel found that:

> the appearance of counsel with Butler at a bond hearing on the assault charge for which he was first arrested conclusively demonstrated invocation of Butler's fifth amendment rights. The subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the Edwards rule as modified in Roberson.

Order at 2-3. The panel further conceded that if petitioner's case was before the court on direct appeal it would in all likelihood reverse the conviction and remand the case for a new trial. Order at 3. The panel then examined the retroactive effect of Roberson in collateral proceedings in accordance with the three factors established by this Court in Stovall v. Denno, 388 U.S. 293 (1967):

> (1) the purpose of the new rule of law; (2) the extent of reliance by law enforcement authorities on the old

> standard; and (3) the effect of retroactive application upon the administration of justice. Allen v. Hardy, __ U.S. __, 106 S.Ct. 2878, 2880 (1986).

Id. Applying this test, the panel decided that petitioner could not claim any retroactive benefit from Roberson.

> The Edwards-Roberson limitations on police interrogation have only the most tangential relationship to truth finding. They are, rather, a part of the prophylactic protection accorded the fifth amendment right to counsel as a means of establishing "guidelines to the law enforcement profession." Roberson, 56 U.S.L.W. at 4592. The interrogation of appellant, while unquestionably contrary to the present "guidelines," was conducted in strict accordance with established law in 1980 [the date of petitioner's arrest]. We, therefore, conclude that Butler may challenge his presumptively valid conviction only by demonstrating that there was an actual violation of his constitutional rights in 1980. On that dispositive issue, the record discloses no support for Butler's claim for habeas relief.

Slip opinion at 3-4. In its retroactivity discussion, the modified panel opinion failed to cite or refer to this Court's decision in Shea v. Louisiana, supra, which held that Edwards was applicable to all cases not yet final on direct review at the time Edwards was decided.

Dissenting from the denial of rehearing en banc, Chief Judge Winter, joined by four other judges, asserted that petitioner's conviction was obtained in violated of the Fifth Amendment. Order at 6. First, the dissent stated that petitioner's confession was constitutionally inadmissible under Edwards standing alone. Id. at 7. Chief Judge Winter then stated that Roberson did not alter the rules of law set forth in Edwards.

> In sum, Roberson says that the law is and has been, since Miranda, that a suspect who has expressed his desire to deal with the police only through counsel is not subject to further interrogation about either the crime he is suspected of having committed or any other crime until counsel has been made available, unless the suspect initiates further communication with the police. There is thus no retroactivity issue presented in the instant case.

Id. at 9 (emphasis in original) (footnote omitted).

REASONS THE WRIT SHOULD BE GRANTED

The decision of the Court of Appeals denying retroactive effect to the rule of Edwards/Roberson is in direct conflict with this Court's decision in Shea v. Louisiana and the decisions of other federal courts of appeal, which hold that Edwards applies to all cases pending on direct appeal at the time that Edwards was decided.

1. This Court's decision in Arizona v. Roberson did not create a new rule of law, but merely applied the "bright-line" rule established in Edwards to a different factual setting.

In Edwards v. Arizona, 451 U.S. 477 (1981), this Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing that he responded to further police-initiated interrogation even if he has been advised of his rights." 451 U.S. at 484 (footnote omitted). Rather once an individual invokes his Fifth Amendment right to counsel, he is not subject to further interrogation by the authorities unless "the accused himself initiates further communication, exchanges, or conversations with the police." Id. at 484-85. The Court realized that it would be "inconsistent with Miranda [v. Arizona, 384 U.S. 436 (1966)] and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." Id. at 485. This "bright line" rule of Edwards has been consistently reaffirmed by this Court. See e.g., Smith v. Illinois, 469 U.S. 91, 98 (1984); Michigan v. Jackson, 475 U.S. 625 (1986) (applying Edwards rule to invocation of Sixth Amendment right to counsel).

Last term in Arizona v. Roberson, this Court applied the Edwards rule to a slightly different factual setting. In Roberson, the accused was arrested and advised of his Miranda rights. He indicated that he wanted to speak with an attorney before answering any questions. While in custody, a different officer questioned him about a different offense. After again

being advised of his rights pursuant to Miranda--and waiving those rights--Roberson gave an incriminating statement to the police as to the second offense. The statement was suppressed by the trial court, and the suppression order was affirmed on appeal. Certiorari was granted and this Court affirmed the decision of the Arizona Court of Appeals. The Court held that Roberson's case was directly controlled by Edwards v. Arizona, and, therefore, the fact that the request for counsel occurred in the context of a separate investigation was without legal significance. 108 S.Ct. at 2098.[3]

On at least two points, the judges in the majority and the five judges dissenting from the denial of rehearing en banc in petitioner's case were in agreement. First, both the majority and the dissent acknowledged that under this Court's analysis in Arizona v. Roberson, petitioner's conviction was constitutionally infirm. Secondly, both sides appeared to acknowledge that Arizona v. Roberson was not new law but rather was merely an application of the "bright-line" rule created in Edwards to slightly different facts. See Order at 2-3 ("[t]he subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the Edwards rule as modified in Roberson," and discussing the "Edwards-Roberson limitations on police interrogation"); Order at 8 ("Roberson did not alter these [Edwards] rules of law") (Winter J., dissenting from the denial of rehearing en banc).

These points of agreement were compelled by this Court's decision in Roberson. There, the Court framed the question as whether to "craft an exception to [the rule of Edwards v. Arizona] for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation." 108 S.Ct. at 2096. The majority ultimately concluded that "[p]etitioner's attempts at

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[3]"That a suspect's request for counsel should apply to any questions the police wish to pose follows, we think, not only from Edwards and Miranda, but also from . . . [Colorado v. Spring, 479 U.S. 564 (1987)]." 108 S.Ct. at 2099.

distinguishing the factual setting here from that in Edwards are . . . unavailing," and affirmed the judgment of the Arizona Court of Appeals. 108 S.Ct. at 2100-01. Thus Roberson involved nothing more than a straightforward application of the Edwards rule to slightly different facts. Under these circumstances, the question before this Court is whether the bright-line rule of Edwards v. Arizona applies retroactively to petitioner's case.[4] Because this Court has already answered this question in the affirmative in Shea v. Louisiana, supra, the Court of Appeals' ruling to the contrary should be reversed.

2. Because petitioner's case was pending on direct appeal at the time that this Court decided Edwards v. Arizona, the Court Appeals incorrectly determined that the "bright-line" rule established in Edwards did not apply retroactively in this case.

The Court of Appeals determined that the "bright-line" rule established in Edwards v. Arizona, supra, and reaffirmed last Term in Arizona v. Roberson, did not apply in petitioner's case because the Edwards rule was not in effect at the time of his arrest in 1980. The panel stated:

> We, therefore, conclude that Butler may challenge his presumptively valid conviction only by demonstrating

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[4]See United States v. Johnson, 457 U.S. 537, 548 (1982). In Johnson, this Court recognized:

> [W]hen a decision of this Court merely has applied settled precedents to new and different fact situations, no real question has arisen as to whether the new decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that decision in any material way.

Id. at 549 (citations omitted). The need for this "threshold test" is self-evident. If every constitutional decision applying settled legal precedents to new facts were deemed to give rise to a "retroactivity" question, no decision would ever have any precedential effect, since each decision would establish on the date of its announcement a new starting date for the constitutional right involved. For this reason, the Court has invariably insisted upon "automatic" retroactive application of any decision which "did nothing more than apply settled precedent to different factual situations." Griffith v. Kentucky, 479 U.S. 314, 324 (1987); see also Yates v. Aiken, 108 S.Ct. 534, 538 (1988) (because Francis v. Franklin, 471 U.S. 307 (1985) was "merely an application of the principle that governed our decision in Sandstrom v. Montana, [442 U.S. 510 (1979)]" it applied to petitioner's 1981 murder trial); Truesdale v. Aiken, 480 U.S. 527 (1987) (per curiam); Lee v. Missouri, 439 U.S. 461 (1979) (per curiam).

> that there was an actual violation of his constitutional rights in 1980. On that dispositive issue, the record discloses no support for Butler's claim for habeas relief.

Order at 4. The modified order of the panel totally ignores one basic fact which is dispositive of petitioner's claim: Edwards v. Arizona was decided while petitioner's case was pending on direct appeal to the South Carolina Supreme Court. Thus this Court has already resolved the retroactivity question presented in this case. In Shea v. Louisiana, 470 U.S. 51 (1985), this Court specifically held that Edwards applied to cases pending on direct review at the time it was decided. 470 U.S. at 59. See also Griffith v. Kentucky, 479 U.S. at 328 ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases sate or federal, pending on direct review or not yet final");[5] Yates v. Aiken, ___U.S.___, 108 S.Ct. 534, 537 (1988) (acknowledging that new rules apply retroactively to cases pending on direct review at time rule was established). Thus, as Edwards was decided on May 18, 1981, and the South Carolina Supreme Court did not issue its opinion in petitioner's case until February 22, 1982, Shea permits no other conclusion except that the "bright-line" rule of Edwards was applicable in this case. The Court of Appeals was incorrect in ruling otherwise.[6] See Shea, supra; see also Lamp v. Farrier, 763 F.2d 994, 997 n. 5 (8th Cir. 1985) (Edwards applied to case tried before Edwards but pending on direct appeal at time Edwards was handed down); accord, Flournev v. Marshall, 842 F.2d 875, 878 (6th Cir. 1988); United States ex rel. Adkins v. Greer, 791 F.2d 590, 595 n. 3 (7th Cir. 1986); Greenwalt v. Ricketts, 784 F.2d

[5]In Griffith this Court explicitly reaffirmed its decision in Shea. 479 U.S. at 325-26.

[6]The order of the Court of Appeals denying rehearing relied exclusively on Allen v. Hardy, 478 U.S. 255 (1986) (holding that Batson v. Kentucky, 476 U.S. 79 (1986) did not apply retroactively to cases already final on direct review at the time Batson was decided), and Solem v. Stumes, 465 U.S. 638 (1984) (holding that Edwards did not apply retroactively to cases already final on direct review at the time Edwards was decided). In its December 2 order, the Court of Appeals never discussed the applicability of--or even cited--this Court's retroactivity rulings in Shea v. Louisiana and Griffith v. Kentucky.

1453, 1457 (9th Cir. 1986); Cervi v. Kemp, 855 F.2d 703, 705 n. 9 (11th Cir. 1988).

What makes the retroactivity decision reached by the panel in its modified order all the more mystifying is that the panel had previously held that Edwards did apply retroactively to petitioner's case. In its previous decision, the panel noted that the district court had erroneously concluded that Edwards was not applicable because it had not been decided at the time of petitioner's trial. Butler v. Aiken, 846 F.2d at 257.

> Unfortunately, the district court's failure to address this claim on the merits must be regarded as error. Although Edwards does not have retroactive effect, it does apply to cases pending on direct appeal at the time it was decided. Shea v. Louisiana, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985). Butler's appeal was in fact pending at that time. We must, therefore, consider whether Butler's interrogation did produce incriminating statements in violation of his right to counsel.

Id.[7] Thus in its order modifying its previous opinion, the panel apparently reversed itself on this issue.

The panel apparently concluded at this stage of the proceedings that because petitioner's case was before it in a federal habeas corpus proceeding, the proper inquiry was whether Edwards was in effect at the time of petitioner's arrest and trial. Order at 3.[8] However, as this Court's retroactivity

[7]The panel ultimately concluded that there was not constitutional violation because the interrogation took place in conjunction with a separate investigation. 846 F.2d at 257-58. This, of course, is the reasoning rejected last term in Roberson.

[8]The panel stated:

> As an initial matter, we reject respondent's efforts to distinguish Roberson factually. We assume for the purposes of decision that the appearance of counsel with Butler at a bond hearing on the assault charge for which he was first arrested conclusively demonstrated invocation of Butler's Fifth Amendment rights. The subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the Edwards rule as modified in Roberson. If this case were before us on direct appeal, we would in all likelihood be compelled to reverse the conviction and remand for a new trial. It does not follow, however, that Butler is entitled to habeas relief based upon a rule of law that was not in effect at the time of his arrest and trial.

Id.

decisions reveal, the court in which the case is pending cannot determine whether the applicability of a decision of this Court. Rather, the decision properly turns on whether the legal rule in question was in effect at the time the case became final on direct review. See Griffith v. Kentucky, 479 U.S. at 328 ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final. . . ."); see also Yates v. Aiken, supra; Shea v. Louisiana, supra. If the rule was in effect, or became effective, at any time prior to the case becoming final on direct review, then a habeas corpus petitioner is entitled to the benefit of that rule in his case.[9] The decision of the Court of Appeals' decision ignores this well settled rule, and cannot stand.

[9]At the risk of belaboring the obvious, petitioner would note that any other conclusion would lead to anomalous results. If retroactivity of a constitutional rule turned solely on the stage of the proceedings in which the retroactivity question arose, without regard to when the rule was established, a state court could effectively eliminate federal habeas corpus review by the simple expedient of refusing to give effect on direct appeal to new constitutional decisions of this Court. This would essentially give the state courts the power to nullify the decisions and constitutional principles established by this Court, without protecting any legitimate state interest. In short, the rule apparently adopted by the Court of Appeals would effectively turn the Supremacy Clause on its head.

CONCLUSION

Because the decision of the Court of Appeals is in direct conflict with the applicable decisions of this Court governing the retroactivity of constitutional decisions, the judgment below should be summarily reversed, and petitioner's case should be remanded with instructions to grant the writ of habeas corpus. Truesdale v. Aiken, 480 U.S. 527 (1980). Alternatively, the petition for writ of certiorari should be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

February 22, 1989.

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APPENDIX A

Supreme Court, U.S.
FILED
FEB 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

MICROFILMED
FILED
JUN 9 1987
ANN A. BIRCH, CLERK
COLUMBIA, S. C.
ENTERED
6-9-87

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Horace Butler,

Petitioner,

vs.

James Aiken, Warden, Central Correctional Institution, and Travis Medlock, Attorney General, State of South Carolina,

Respondents.

ORDER

C/A No. 86-1093-3

This matter is before the Court for review of the Magistrate's Report made in accordance with 28 U.S.C. § 636(b)(1)(B) and the Order of the District Court filed May 9, 1987.

The Magistrate makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. Mathews v. Weber, 423 U.S. 261 (1976). The Court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made, and the Court may accept, reject or modify, in whole or in part, the recommendation of the Magistrate, or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1).

BACKGROUND

Petitioner is incarcerated by the South Carolina Department of Corrections at the Central Correctional Institute, awaiting

execution for the crime of murder. He was indicted in October 1980 in Charleston County. After timely notice that the circuit solicitor intended to seek the death penalty, the petitioner was tried on January 19, 1981 before The Honorable C. Anthony Harris. A verdict of guilty was returned on January 24, 1981. On January 26, 1981 the jury further recommended imposition of the death penalty after finding the murder was committed while in commission of the crime of rape.

Petitioner filed an appeal of his conviction and sentence, but these were affirmed by the South Carolina Supreme Court on February 22, 1982. State v. Butler, 277 S.C. 452, 290 S.E.2d 1 (1982). Petitioner then filed a petition for writ of certiorari to the United States Supreme Court, which was denied on October 12, 1982. Butler v. South Carolina, 459 U.S. 932 (1982).

Petitioner next filed an application for post-conviction relief. A hearing was held April 1, 1983 before The Honorable Richard E. Fields. On January 28, 1984 the petition was denied. An appeal of this denial was filed with the South Carolina Supreme Court, but the appeal was denied August 27, 1985. Petitioner then filed another petition for certiorari before the United States Supreme Court, which was denied. Butler v. South Carolina, No. 85-5926, filed January 26, 1986.

Petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 on May 2, 1986 alleging numerous violations of his constitutional rights. He is currently represented by Dale Cobb, Esquire, of Charleston. Respondents filed a motion for summary judgment on June 13, 1986. The Magistrate's Report and

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Recommendation was filed March 9, 1987. In his Report, the Magistrate recommended that respondents' motion for summary judgment be granted. Petitioner filed Objections to this Report April 10, 1987.

Respondents submit that petitioner has apparently exhausted all state remedies available and respondents unconditionally waive the defense of exhaustion as to all issues presented in the petition.

FACTS

The victim was Pamela Lane, an eighteen year old white female. At the time of her death, Lane was working as a clerk at Dodge's, a small convenience store on Highway 17, south of Charleston. On July 17, 1980 Lane worked the afternoon and evening shift. During her shift, her sister and brother-in-law delivered a new Moped to the store for Lane to ride home on. At 10:00 p.m. Lane and another employee closed the store and prepared to leave. Lane had some difficulty starting the Moped and called her sister several times. After the last telephone call at about 10:30 p.m., she successfully started the Moped and left the store. The other employee told Lane's sister that Lane was "on her way." Lane was last seen alive heading south on Highway 17 on her new Moped.

Early the next morning Lane's sister reported her disappearance. A few hours later several people fishing from a bridge discovered a body and reported it to the police, who determined it was the body of Pamela Lane. She had been shot once in the chest by a small caliber gun. The following day the

minister of a local church discovered a Moped partially submerged in the pond behind his church. After seeing news reports on the death of Pamela Lane, he contacted authorities. The Moped was identified as the one Pamela Lane was riding when last seen.

Six weeks later, on August 30, 1980, Horace Butler was arrested on an unrelated charge and placed in the Charleston County Jail. He retained a local attorney, W. McAlister Hill, who appeared with him at a bond hearing late Sunday evening, August 31, that same day, but was unable to make bond and remained in jail. In the early morning of September 1, 1980 at 12:50 a.m., Butler was removed from his cell and transported to the Charleston County Police Department. From that time until approximately 5:45 a.m., he was interrogated about the murder of Pamela Lane. During this period Butler made two confessions and signed two "waiver of rights" forms.[1] He apparently did not request his attorney's presence at any time.

In his first confession Butler claimed a friend, named Larry White, had killed Lane and then sought Butler's help in disposing of the Moped. After reciting this version, one of the police officers present told Butler he did not believe the story because there were too many inconsistencies and because Larry White had already talked to them. Butler then signed the second waiver form and confessed to the murder of Pamela Lane. According to the second confession, Butler saw Lane on her Moped and followed her. When he blinked his lights at her she pulled off the road,

[1] A form waiving the rights guaranteed an accused under Miranda v. Arizona, 384 U.S. 436 (1966).

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hid the Moped in some bushes and got in his car. After driving to a wooded area, he claims she suggested sex and began removing her clothes. After the alleged consensual sex, as she was redressing, he claims she said she was going to be late getting home and would cry rape. Butler stated that he panicked and shot her, then dumped her body off the bridge where it was found. He claims he then found Larry White who helped him dispose of the Moped.

After making the second confession, petitioner took police to the area where these events occurred and identified the actual scenes where he met the victim, had sexual relations with her and killed her.

ISSUES

The issues presented in petitioner's Objections are:

1. Ineffective assistance of counsel.

2. Denial of petitioner's Sixth and Fourteenth Amendment rights to a jury selected from a representative cross section of the community.

3. Denial of petitioner's Sixth, Eighth and Fourteenth Amendment rights to a fair and impartial jury by qualifying a juror who could not vote for a life sentence.

4. Denial of petitioner's Fifth and Fourteenth Amendment rights to due process by allowing evidence of unrelated prior crimes.

5. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by permitting statements to be introduced in

violation of South Carolina's copy rule (S. C. Code §§ 8-15-50, 19-1-80 and 19-1-90).

6. Denial of petitioner's Fifth and Fourteenth Amendment rights to due process by failing to instruct the jury that voluntary manslaughter was a possible verdict.

7. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights to be informed of the charges against him because the state never indicted him for rape.

8. Denial of petitioner's Fourteenth Amendment rights not to be convicted except upon evidence sufficient to convince a rational trier of fact of his guilt beyond a reasonable doubt.

9. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by use of an impermissible definition for the term reasonable doubt.

10. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by the trial judge's failure to instruct the jury about the consequences of a non-unanimous recommendation of sentence.

11. Denial of petitioner's Eighth Amendment right to an appropriate review of his death sentence.

12. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by the impermissible jury instruction presuming malice from the use of a deadly weapon.

13. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by virtue of the trial judge's charging the definition of rape in lieu of the definition of criminal sexual conduct during the sentencing phase of petitioner's trial.

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14. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by the trial judge refusing to charge circumstantial evidence.

15. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by failure of the trial judge to rule on the petitioner's claims that the statement(s) taken from him were not the product of a free and voluntary waiver.

DISCUSSION

1. INEFFECTIVE ASSISTANCE OF COUNSEL.

Horace Butler was represented by William McAlister Hill. Mr. Hill testified that he had been practicing law in South Carolina since 1974 and that prior to that time he was a state magistrate for four and a half years.

Mr. Hill testified that he was initially retained to represent Butler on an unrelated charge on August 31, 1980. He had previously represented Butler in a workman's compensation case and he had known Butler's father and family for a number of years.

Petitioner contends that he was denied the effective assistance of counsel both at the guilt phase of his trial and at the sentencing phase. Specifically in his Objections, petitioner has listed seven different areas in which he contends his trial counsel was ineffective.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court gave specific guidance for evaluation of ineffective assistance of counsel claims:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that tenders the result unreliable.

466 U.S. at 687.

The two components of a claim for ineffective assistance of counsel are commonly called error and prejudice. To demonstrate error, the "defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 689. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Turner v. Bass, 753 F.2d 352 (4th Cir. 1985). Furthermore, prejudice to the defense must be present for reversal. Strickland requires that

> [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. at 694; Briley v. Bass, 750 F.2d 1238 at 1247 (4th Cir. 1984).

Strickland noted other areas for courts to be sensitive to in its review of these claims. The Court emphasized that "judicial scrutiny of counsel's performance must be highly deferential" and that "a court must indulge a strong presumption

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that counsel's conduct falls within the wide range of reasonable professional assistance," viewing the case as of the time of counsel's conduct rather than in hindsight, and recognizing counsel's discretion in the shaping of trial strategy. 466 U.S. at 689-690.

A. Counsel failed to object to highly prejudicial testimony regarding the petitioner's propensity "to carry a pistol."

At trial the prosecution posed the following question to Larry White:

Q: Was he [petitioner] known to carry a pistol? The witness responded affirmatively.

Petitioner contends that failure to object to this question constitutes ineffective assistance of counsel. The South Carolina Supreme Court considered this issue on direct appeal. That court concluded that there was "no error" in the admission of the testimony since it was merely cumulative. Therefore, the admission of this testimony fails to meet the prejudice prong of the Strickland test.

B. Failing to display even the rudimentary knowledge of how to proceed with a Jackson v. Denno hearing.

The main contention petitioner advances in this argument is Mr. Hill's alleged unfamiliarity with the proper procedure in the suppression hearing. The record reveals that Mr. Hill was prepared to proceed initially at the hearing rather than waiting for the state to proceed, as is customary in such hearings.

In its consideration of this issue the South Carolina Supreme Court concluded that Mr. Hill desired to proceed first as a matter of trial tactics based upon an informed opinion and his understanding of the totality of the circumstances surrounding the confession. The Strickland test mandates that this Court recognize counsel's discretion in the shaping of trial strategy. Nevertheless, inasmuch as the state proceeded first in presenting its case in the hearing, there could be no prejudice arising from Mr. Hill's intended strategy.

C. Failure of counsel to recuse himself and testify at the Jackson v. Denno hearing.

Petitioner contends that only Mr. Hill knew that he had warned the police not to talk to the Petitioner. At trial the police officers specifically denied that counsel told them not to talk to the petitioner. (See Tr. pp. 88, 96, 113).

Nevertheless, the objection is without merit. Any instruction to the police not to talk to the petitioner could not have related to the murder charge. At the time of the alleged instruction none of the individuals knew that the petitioner was a suspect in the murder investigation.

Petitioner's Sixth Amendment right to counsel had not yet attached as to the murder charge. Maine v. Moulton, ___ U.S. ___, 106 S.Ct. 477 (1985). Furthermore, Miranda is designed to protect the suspect's Fifth Amendment rights. It will not be extended to attorney's communications to the police concerning his client. Moran v. Burbine, ___ U.S. ___, 106 S.Ct. 1135 (1986).

Therefore, the failure of counsel to recuse himself and testify about the warnings did not deprive the petitioner of any constitutional protections. Nor is any prejudice to his case apparent from this omission.

D. Failure to investigate, prepare and present alibi witnesses.

Petitioner claims that trial counsel failed to make a sufficient preliminary investigation into the possibility of presenting an alibi defense. Mr. Hill testified that he made a full investigation as to all possible alibi witnesses for the petitioner. (App. at 287, et seq.). Therefore, this ground for relief is patently meritless under Strickland.

E. Failure to specifically interview Margo Brown.

The error complained of in this assertion is that counsel failed to interview Ms. Brown, a potential State's witness. Mr. Hill testified that he had extensive knowledge of the relationship between Ms. Brown and the petitioner. He had in fact defended the petitioner in an action brought by Ms. Brown arising from his allegedly "threatening to throw her baby in the fire." (App. at 291). Mr. Hill was acutely aware of her "deep hatred for Horace."

In light of counsel's familiarity with Ms. Brown and her failure to testify, this Court cannot discern any prejudice to petitioner's case resulting from failure to

interview Ms. Brown; nor has petitioner demonstrated any such prejudice.

F. Counsel failed to prepare or present mitigating testimony despite his avowed knowledge that it was available.

Although Mr. Hill did not present any mitigation testimony, the record is replete with testimony regarding his consideration of mitigation witnesses, his discussions with the petitioner regarding these witnesses and his reasons for not calling each of the witnesses considered. (See App. pp. 66-74, 161-172, 192-199, 289-290, 314-315, 350-358, 423). Mr. Hill adequately explained his decision not to use these witnesses from a strategical point of view. Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977). Petitioner has failed to prove that his tactics were unreasonable under prevailing professional standards or that the presentation of such evidence would have rendered a more favorable sentence.

G. Failure to have petitioner psychiatrically evaluated for the sentencing phase of the trial.

At the trial Mr. Hill presented the testimony of the petitioner's elementary school principal, Mr. Isiah Frazier. Mr. Frazier testified as to the petitioner's poor academic record and that he left school at age sixteen while he was in the fourth grade. (Tr. pp. 1004-1008).

During the post-conviction hearing petitioner presented the testimony of Dr. John Roitzsh, a clinical psychologist.

This testimony indicated that petitioner tested as a borderline mental retardate. (App. pp. 152, 156).

Like the state court, this Court finds that the failure to present psychological evaluations does not rise to the level of ineffective assistance of counsel. Although such evidence may have been beneficial, it would not have revealed any additional mitigating evidence. The testimony of Mr. Frazier, if believed, was sufficient to reveal the message contained in the psychiatric evaluation, i.e., that petitioner was impaired by a lack of education and low intelligence level. The absence of the psychiatric evaluation did not prejudice petitioner's defense.

2. DENIAL OF PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A JURY SELECTED FROM A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY.

Petitioner asserts that the jury for his trial was improperly selected, in that eight potential jurors were excluded because they opposed the death penalty, thus denying petitioner a jury which fairly represented a cross section of the community. The jury as it was eventually empanelled contained nine whites and three blacks; and there were two alternates (one white, one black). Petitioner has argued that these jurors were not a representative cross section of the community because no person unalterably opposed to the death penalty served on the jury.

In the recent case of Lockhart v. McCree, 476 U.S. ___, 90 L.Ed.2d 137 (1986), the Court concluded that jurors who are unalterably opposed to the death penalty may be excluded from serving during the penalty phase. Furthermore, their exclusion

from the guilt phase does not infringe on a defendant's right to an impartial jury. The Court reiterated in Lockhart that a defendant is not entitled to a jury which statistically mirrors the make-up of a community, but only to a jury from which members of a "distinctive group" have not been systematically excluded. See also Batson v. Kentucky, 476 U.S. ___, 90 L.E.2d 69 (1986). Although the Lockhart majority stopped short of defining "distinctive group," the opinion does indicate that individuals who could not under any circumstances render a capital sentence (a.k.a. "Witherspoon excludables") do not constitute such a "distinctive group" for cross section purposes. 106 S. Ct. at 1765.

Therefore, petitioner's Sixth and Fourteenth Amendment rights to a jury selected from a representative cross section of the community have not been violated by the exclusion of jurors who could not recommend a capital sentence.

3. DENIAL OF PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL JURY, BY QUALIFYING A JUROR WHO COULD NOT VOTE FOR A LIFE SENTENCE.

Petitioner next alleges that one juror, Jennings B. Knight, should have been excluded for cause based on his belief that the death penalty is warranted in all cases of murder. The trial judge questioned Mr. Knight about his ability to apply the law as it was charged. After considering the responses to these questions the trial judge was satisfied that Mr. Knight was properly qualified to sit as a juror.

In Wainwright v. Witt, 469 U.S. 412 (1985), the Court indicated that a juror may not be excluded for cause unless his

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views on capital punishment would prevent him from performing his duties as a juror in accordance with his instructions and his oath. In reviewing the qualification of a juror the trial judge's factual finding of the juror's capacity is the determinative inquiry.

Under 28 U.S.C. § 2254(d) federal courts must accord a presumption of correctness to state court findings of fact. The statute provides that "a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction ... shall be presumed to be correct."

Petitioner has failed to offer any evidence which undermines the § 2254(d) presumption on this issue. Based on the record and the trial judge's satisfaction with Mr. Knight's responses, this Court concludes that he was properly qualified as a juror.

4. DENIAL OF PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS BY ALLOWING EVIDENCE OF UNRELATED PRIOR CRIMES.

Petitioner next asserts that the trial judge allowed a prosecution witness, Larry White, to testify about matters which improperly attacked petitioner's character and connected petitioner to prior crimes. The testimony giving rise to this objection was elicited by the prosecutor when he asked whether the petitioner "was known to carry a pistol?" There was no objection to the question or the witness' affirmative response.

The South Carolina Supreme Court addressed this issue and concluded that admission of the testimony constituted no error as a matter of state law.

Absent "circumstances impugning fundamental fairness or infringing specific constitutional protections," admissibility of evidence does not present a federal question. Grundler v. North Carolina, 283 F.2d 798, 802 (4th Cir. 1960). This Court discerns no such unfairness or constitutional infringement in the admission of this evidence.

5. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY PERMITTING STATEMENTS TO BE INTRODUCED IN VIOLATION OF SOUTH CAROLINA'S COPY RULE (S. C. CODE §§ 8-15-50, 19-1-80 AND 19-1-90).

Under South Carolina law, a person who makes a "statement," particularly a witness in a criminal proceeding, must be given a copy of the statement at the time it is made. S. C. Code §§ 8-15-50 and 19-1-80, 90 (1976). Petitioner signed a confession on September 1, 1980 but was not given a copy until September 22, 1980. The trial judge nonetheless allowed the confession to be admitted at trial over objection of counsel. The South Carolina Supreme Court agreed and construed the statutes to mean that the witness (or here, the petitioner) must be allowed ample opportunity to review the statement and, if desired, to refute the statement. They found that the purpose of the rule had been fulfilled since petitioner had nearly four months to review the statement before his trial.

A decision on state law by a state court is entitled to be given great weight and where they do not infringe on specific constitutional protections, violations of state law are not cognizable under 28 U.S.C. § 2254. Chance v. Garrison, 537 F.2d 1212 (4th Cir. 1976) (citing Grundler, supra).

6. DENIAL OF PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS BY FAILING TO INSTRUCT THE JURY THAT VOLUNTARY MANSLAUGHTER WAS A POSSIBLE VERDICT.

Despite requests from the petitioner the trial judge refused to charge manslaughter as a possible verdict. At trial counsel argued that the victim's alleged threat to accuse the petitioner of rape was sufficient provocation to justify instruction on the lesser offense. The South Carolina Supreme Court, like the trial judge, disagreed, specifically finding no "legal provocation" in these circumstances which would warrant an instruction as to manslaughter.

The elements of a crime are defined by state law. Specifically, S.C. Code Ann. § 16-3-10 (1976), defines the crime of murder. The elements of manslaughter are defined at S. C. Code Ann. § 16-3-50 (1976). This issue raises a question of proper jury instructions as a matter of state law. The case of Grundler v. North Carolina, supra, specifically addresses federal review of jury instructions. Even if this Court disagreed with the trial judge's ruling or the state court's interpretation of the law, the issue is immune from federal scrutiny absent limited circumstances not present herein.

Petitioner's attempt to transform this state law issue into a due process violation is unpersuasive. Refusal to charge manslaughter resulted in no fundamental unfairness nor in any abrogation of a constitutional protection.

7. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO BE INFORMED OF THE CHARGES AGAINST HIM.

Petitioner argues that he was "held to answer" for the crime of rape without first being indicted, in violation of Article I,

Section 11 of the South Carolina Constitution. The question presented here is whether a person properly charged with capital murder must be indicted for the aggravating circumstances brought out during the trial.

The South Carolina Supreme Court is responsible for interpretations of state law, unless and until those laws infringe on constitutionally protected rights of the individual. Grundler v. North Carolina, supra. The petitioner was not "held to answer" for the separate crime of rape, even though the evidence of rape affected the severity of his punishment. The circumstances which increased the severity of his punishment had to be proven beyond a reasonable doubt. The state met the constitutionally dictated burden of proof on every element of the murder charge and the aggravating circumstances.

8. DENIAL OF PETITIONER'S FOURTEENTH AMENDMENT RIGHTS NOT TO BE CONVICTED EXCEPT UPON EVIDENCE SUFFICIENT TO CONVINCE A RATIONAL TRIER OF FACT OF HIS GUILT BEYOND A REASONABLE DOUBT.

Petitioner alleges that his sentence should be reversed because the evidence does not support a finding that he committed a rape. In his brief petitioner set forth the five factors in evidence which tended to prove rape and four factors in evidence which tended to disprove rape.

The South Carolina Supreme Court found the evidence sufficient to create a question for the jury. It is a well-settled principle of law in this state that the "trial court is concerned only with the existence of evidence, not its weight." State v. Butler, 277 S.C. 452, 290 S.E.2d 1, at 4 (1982). "Any evidence direct or circumstantial reasonably tending to prove the

guilt of the accused creates a jury issue." (emphasis added). State v. Butler, 290 S.E.2d 1, at 4. Therefore, the five pieces of evidence which tended to prove rape created a jury issue and provided a basis on which a rational factfinder could have arrived at an opinion that, beyond a reasonable doubt, petitioner committed rape. The standard applied by a federal habeas corpus court in determining the sufficiency of the evidence neither permits a court to make its own subjective determination of guilt or innocence, nor requires scrutiny of the reasoning process actually used by the factfinder. Jackson v. Virginia, 443 U.S. 307 at fn. 13 (1979). Sufficient evidence existed in the record that the case should have been submitted to the jury on the aggravating circumstance of rape. There has been no constitutional infringement in this regard.

9. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY USE OF AN IMPERMISSIBLE DEFINITION FOR THE TERM REASONABLE DOUBT.

Unlike jury instructions which are based on state law, instructions as to reasonable doubt may rise to the level of constitutional concern. All criminal defendants are considered innocent until proven guilty beyond a reasonable doubt, a basic tenet of the due process guaranteed all people by the Fifth and Fourteenth Amendments. The Supreme Court has never specifically considered the propriety of instructions which define reasonable doubt, although it has noted that the attempt to define "reasonable doubt" has been criticized. See Taylor v. Kentucky, 436 U.S. 478, 488 (1978), and cites therein. The consensus among

courts is that "reasonable doubt" is a phrase generally understood by laymen, which needs no further definition.

The judge in the instant case defined reasonable doubt three times. During the guilt phase, he instructed the jury that it was

> ... a doubt for which you have a real reason, not a frivolous doubt, not a whimsical, fanciful doubt, because you can doubt any proposition if you wanted to, but a reasonable doubt is a substantial doubt for which an honest person seeking the truth can give a real reason. (Tr. 940, line 24-941, line 3).

During the sentencing phase, he redefined reasonable doubt using the same language. (Tr. 1022, lines 12-16.) After instructing the jury as to circumstantial evidence, the trial judge again defined reasonable doubt in the following manner:

> The two phrases "beyond a reasonable doubt" and "proof to a moral certainty" are basically synonymous and they are the legal equivalent of each other. These phrases, however, connote a degree of proof which is distinguished from an absolute certainty. Proof beyond a reasonable doubt, which the law in its mercy requires for the benefit of the accused, is not a weak or slight doubt, but it is a serious or strong or substantial well-founded doubt as to the truth of the matters asserted by the state. (Tr. 1026-1027).

Petitioner accurately asserts that several courts have overturned convictions where a trial judge has defined reasonable doubt in such a manner that the defendant's burden of proof was increased. Smith v. State, 247 S.E.2d 925 (Tenn. 1977); and State v. Davis, 482 S.W.2d 486 (Mo. 1972). Those cases disapproved instructions which equated reasonable doubt with "substantial" doubt. The Fourth Circuit Court of Appeals has considered this issue in Smith v. Bordenkircher, 718 F.2d 1273, cert. denied, 104 S. Ct. 2355 (1983); and in Murphy v. Holland, 776 F.2d 470 (4th Cir. 1985). In both cases, that court agreed that the instructions were ill-advised, but declined to overturn the convictions. The instructions given in Murphy are similar to those used here, but the Court upheld their use. In essence, although the federal courts may deplore the attempts to define reasonable doubt, that assertion alone is not sufficient to warrant granting the writ of habeas corpus.

10. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY THE TRIAL JUDGE'S FAILURE TO INSTRUCT THE JURY ABOUT THE CONSEQUENCES OF A NON-UNANIMOUS RECOMMENDATION OF SENTENCE.

The jury was told by the trial court that a recommendation of either the death penalty or of life imprisonment must be made by a unanimous verdict of the jury. Under South Carolina law, only the recommendation of the death penalty need be unanimous. S. C. Code Ann. § 16-3-20(c) (1976, as amended). Petitioner contends this incorrect instruction undermined the reliability of the sentencing proceeding required by Woodson v. North Carolina, 428 U.S. 280, at 303 (1976), because the instruction injected an arbitrary element into the jury deliberations.

After the sentencing verdict was returned, the jury was polled by the trial judge. All the jurors indicated that they agreed with and voted for the death penalty. This Court is unable to discern any prejudice resulting from the trial judge's failure to more fully instruct the jury on the consequences of their deliberations procedure. Habeas relief will not be granted based on speculative injury only.

11. DENIAL OF PETITIONER'S EIGHTH AMENDMENT RIGHTS TO AN APPROPRIATE REVIEW OF HIS DEATH SENTENCE.

S.C. Code Ann. § 16-3-25(c)(3) requires the South Carolina Supreme Court to review every death sentence and determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

In its proportionality reviews, the state supreme court has chosen to compare a given death penalty case only with other death penalty cases. Petitioner asserts that his case should be compared with any case similar in circumstances, including those where the death penalty was not imposed.

"Although a comparative proportionality review may be a safeguard against arbitrarily imposed death sentences, it is not required under the Constitution." Shaw v. Martin, 733 F.2d 304, at 317 (4th Cir. 1984); citing Pulley v. Harris, 465 U.S. 37 (1984). Absent constitutional protections, the necessity and sufficiency of proportionality review remains a question of state law. Shaw, supra.

12. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY THE IMPERMISSIBLE JURY INSTRUCTION PRESUMING MALICE FROM THE USE OF A DEADLY WEAPON.

Petitioner argues that the judge's charge on malice impermissibly "presumed away" an element of the offense of murder when he charged:

> Malice may also be inferred or presumed from the use of a deadly weapon in the commission of the homicide. (Tr. 943).

Petitioner cites Francis v. Franklin, 471 U.S. 307 (1985), and Sandstrom v. Montana, 442 U.S. 510 (1979), in support of this exception. Francis speaks of three types of presumptions. The

first type is a mandatory or irrebuttable presumption, where the fact is presumed if the state proves certain predicate facts. This presumption is unconstitutional because it totally removes the presumed element of the crime from the case. Francis, supra, at 355, n.5. The second type of presumption is a mandatory rebuttable presumption. These are usually considered unconstitutional because they shift the burden of proof to the defendant. A rebuttable presumption may be constitutional if it shifts only the burden of production to the defendant, not the burden of persuasion. Sandstrom, at 515. If the instruction could be interpreted by a reasonable juror as requiring the defendant to prove by any degree of proof that the element of the crime is not present, then the State has been relieved of its responsibility and the instruction is unconstitutional. Sandstrom, at 517.

The third type of presumption is called a "permissible inference," which may be constitutional because

> ... it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proven. Franklin, at 353.

A permissive inference may still be unconstitutional if the conclusion would not be naturally drawn from the predicate facts. See Ulster County Court v. Allen, 442 U.S. 140, 157-163 (1979).

The Supreme Court in Franklin, supra, found that the jury there was instructed that the presumption could be rebutted, but held that this charge still had the effect of shifting the burden of proof to the defendant. Franklin, at 355.

The charge to which petitioner excepts is a permissive inference. It instructs the jury that if the crime was committed with a deadly weapon, the jury may infer, or presume, malice.

The Francis Court also instructs that "the potentially offending words must be considered in the context of the charge as a whole." 105 S.Ct. at 1971. Therefore, other portions of the charge must also be considered to determine if they mitigate the potential harmful impact of the suspect portion. The jury was also told

> I hasten to tell you that even if the facts proven in the case are such as to give rise to the inference or implication of malice, that implication is strictly rebuttable. (Tr. 943, lines 13-16).

At this point, the instructions would have read as a mandatory rebuttable presumption. The trial judge continued, however, to water down the presumption.

> It is not binding on you ladies and gentlemen as a matter of law. And when all of the facts and circumstances surrounding the use of a deadly weapon in a homicide have been brought out and presented to a jury, the presumption itself vanishes and it then remains as it always does, your responsibility to make a determination under the facts and circumstances which have been proven to you: Did the defendant have malice ... in his heart and in his mind at the time of the infliction of the fatal injury. (Tr. 943, lines 16-24).

The charge, taken as a whole, creates no more than a permissive inference allowed by Ulster County Court v. Allen, 442 U.S. 140 (1979).

13. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY VIRTUE OF THE TRIAL JUDGE'S CHARGING THE DEFINITION OF RAPE IN LIEU OF THE DEFINITION OF CRIMINAL SEXUAL CONDUCT DURING THE SENTENCING PHASE OF PETITIONER'S TRIAL.

In 1977 the rape statutes, S.C. Code Ann. §§ 16-3-630 to

16-3-650, were replaced by statutes which defined criminal sexual conduct. Petitioner was tried for murder in early 1981. At the time of petitioner's trial, the death penalty statute listed rape as an aggravating circumstance (S. C. Code Ann. § 16-3-20), but the rape statute had been replaced with one for criminal sexual conduct. Neither side here disputes that petitioner could not have been charged with rape since the statute had been repealed. Petitioner here argues two things: first, that the trial court was without jurisdiction to use a repealed statute in determining his sentence; and second, that use of the rape statute relieved the state of its burden of proof on all elements of the offense.

At the time of the incident, the behavior in question was a crime under either statute (rape or criminal sexual conduct). Only the name of the crime had been changed. The South Carolina Supreme Court has determined that the legislature meant for the two terms, rape and criminal sexual conduct, to be used interchangeably. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Their interpretation of state law is not subject to review by a federal court unless petitioner can demonstrate that his constitutional rights were violated by this interpretation. Chance v. Garrison, 537 F.2d 1212 (4th Cir. 1976).

In support of the above issue, petitioner asserts that substitution of the rape statute for that on criminal sexual conduct relieved the state of its burden of proving all elements of the crime.

Rape was defined as the carnal knowledge of a woman by force and without her consent. Criminal sexual conduct is defined as

sexual battery accompanied by aggravated force. Petitioner has claimed that criminal sexual conduct requires the state to prove the additional element of aggravation.

A comparison of the two definitions confirms the state supreme court's conclusion that the two terms are synonymous. The State still had to prove the existence of an act of sexual intercourse, accompanied by some force either actual or threatened. Therefore, the State was not relieved of proving any element of criminal sexual conduct by the trial judge's charge on rape.

14. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY THE TRIAL JUDGE REFUSING TO CHARGE CIRCUMSTANTIAL EVIDENCE.

At the end of the guilt phase of the trial, the judge refused to charge the jury on circumstantial evidence. The petitioner argues that if the jury chose to disregard his confession as being involuntary, the only remaining evidence was circumstantial, thus necessitating the requested instruction.

Where the state relies upon direct evidence a trial judge may properly refuse to charge circumstantial evidence. State v. White, 272 S.C. 384, 252 S.E.2d 294 (1979).

At trial three witnesses, Larry White, Shirley Williams and Curtis Williams, all testified that the petitioner told them he had killed a girl on a Moped. Although their recital of events differed from petitioner's confession, their testimony represents direct evidence of the petitioner's culpability. Sufficient direct evidence was admitted to place the trial judge's refusal

of the charge within the parameters of his discretion under South Carolina law.

Additionally, an instruction on circumstantial evidence is not constitutionally mandated where adequate instructions as to reasonable doubt have been given. Holland v. United States, 348 U.S. 121 (1954).

15. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY FAILURE OF THE TRIAL JUDGE TO RULE ON THE PETITIONER'S CLAIMS THAT THE STATEMENT TAKEN FROM HIM WAS NOT THE PRODUCT OF A FREE AND VOLUNTARY WAIVER.

Horace Butler was arrested the night of August 30, 1980 on an unrelated charge of assault and battery with intent to kill for an incident which occurred several weeks earlier. (Tr. 34). That charge was later dismissed. (Tr. 118). The four officers who arrested him were the same four who were present when he confessed to the murder of Pamela Lane. Twenty-four hours later, at about 8:30 p.m. on August 31, he appeared with his attorney at a bond hearing on the unrelated assault charge. After the bond hearing, he was returned to the Charleston County Jail. Butler's attorney contends that after the bond hearing he told the officers not to question Horace (on the unrelated assault charge). The officers have stated that they do not remember such an instruction. Approximately four hours later, at 12:15 a.m. on September 1, 1980, he was taken from the jail to Charleston County Police Headquarters. Between 12:50 a.m. and 2:55 a.m., he was questioned about the death of Pamela Lane and made his first statement, in which he stated that Larry White killed Pamela Lane, but that he (Butler) helped hide the Moped.

Between 2:55 a.m. and 5:45 a.m., Butler changed his first statement and confessed to the murder himself.

According to testimony given by police, Butler was never coerced or intimidated in any way. He was informed, however, that Larry White had already talked to the police. He was asked at the jail if he wanted to go to police headquarters. (Tr. 41). Prior to any interrogation the police informed Butler that they were charging him with the murder and kidnapping of Pamela Lane. (Tr. 42). They inquired whether Butler was sleepy and whether he was under the influence of any drugs or medication. (Tr. 42). The officers read him his Miranda rights and explained each of the individual rights sequentially. (Tr. 44). According to the police Butler indicated that he understood his rights. (Tr. 45). He signed two separate waivers of those rights during the course of the interrogation. (Tr. 44-45, 48 and 56). Two or three thirty minute breaks were provided throughout the five hour period during which the police and petitioner consumed coffee, water and doughnuts. (Tr. 54 and 62). The officers testified that Butler was never alone with a single officer during the course of the interrogation. (Tr. 54 and 114). Throughout the conversations Butler was responsive to the officers' questions. (Tr. 70). After signing the second confession at 5:45 a.m., Butler indicated again that he was not tired and voluntarily led officers to the scenes where he intercepted the victim, where the sexual intercourse and shooting occurred and where he dumped the body. (Tr. 63). He was returned to the jail at about 10:30 a.m. on September 1, 1980.

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Butler's version of the events varies considerably. He claims that when an officer arrived at the jail to pick him up, he was told he might be going home. (Tr. 97-98). After his arrival at police headquarters, he asserts the police abused him verbally and physically. He claims the officers threatened to arrest his whole family. (Tr. 100).[2]

After hearing testimony at the suppression hearing from Butler, the police officers involved, and Butler's former school principal, who testified about Butler's low intelligence level (Tr. 91-94), the trial judge made the following findings of fact (Tr. 122-123):

A. Defendant-petitioner was afforded his Fifth Amendment rights required by Miranda; and

B. The statements he gave were voluntary and admissible at trial.

Petitioner now asserts that his Fifth and Sixth Amendment rights to counsel were violated and raises three specific questions as to this issue:

A. Whether the right to counsel had attached;

B. Whether petitioner effectively waived that right; and

C. Whether police conduct violated that right.

Those questions also require that we consider whether or not petitioner's confession was voluntary.

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2 Petitioner's father was arrested and charged with being an accessory after the fact, relating to Lane's murder, on September 1, 1980. (App. 30).

> [T]he ultimate question of whether, under the totality of the circumstances, a challenged confession was obtained in a manner compatible with the requirements of the Constitution to be a matter not entitled to a presumption of correctness under 28 U.S.C. § 2254(d) but rather a matter for independent federal determination. Miller v. Fenton, ___ U.S. ___, 106 S. Ct. 445, 88 L.Ed.2d 405 (1985). In so holding the Court recognized that "subsidiary factual questions such as ... whether in fact the police engaged in the intimidation tactics alleged by the defendant ... are entitled to the § 2254(d) presumption." Miller, 106 S. Ct. at 451.

Frederick Wayne Thomas v. Nathan A. Rice, et al., Op. No. 85-7552, at p.5 (4th Cir. 5/14/87).

A. Petitioner's Sixth Amendment Right to Counsel.

Despite contradictory versions of the events which occurred August 30 through September 1, 1980, several facts emerge uncontradicted. All of the events prior to midnight of August 31 (Butler's arrest, detention, retention of counsel, and bond hearing) apparently pertained only to the unrelated assault charge. All events occurring after midnight of August 31 (Butler's removal from jail, interrogation, and confession) related to the eventual murder charge. Attention apparently shifted to Butler because White was also in custody and had implicated Butler (Tr. 53), but the record is completely devoid of any indication as to when police attention focused on Butler. However, there is no evidence that there was any subterfuge by the police in charging Butler on the original (unrelated) assault charge.

Butler was informed at the start of the interrogation that "Right now we are charging you with murder and kidnapping." (Tr. 42, line 8). According to police accounts, he thereafter waived

his right to counsel and his right to remain silent and, eventually, confessed to the crime.

There are several questions raised by these facts. The right to counsel attaches at the start of a custodial interrogation in order to safeguard a suspect's right to be free of self-incrimination under the Fifth Amendment. Miranda v. Arizona, 384 U.S. 436 (1966). The separate right to counsel under the Sixth Amendment does not attach until a suspect has formal proceedings initiated, usually by arraignment. Moran v. Burbine, ___ U.S. ___, 106 S. Ct. 1135 (1986). Specifically, the right to counsel under the Sixth Amendment does not exist prior to "the initiation of adversary judicial criminal proceedings - whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." United Staes v. Gouveia, 467 U.S. 180, 188, quoting Kirby v. Illinois, 406 U.S. 682, 688-689 (1972). The right may attach as early as the time of arrest, United States v. MacDonald, 456 U.S. 1, 6-7 (1982), but the Court in Gouveia, supra, at 190, declined to hold that an arrest always triggers the right to counsel. In short, a defendant has a right to counsel under both the Fifth and Sixth Amendments, but that right attaches at different times under each Amendment. See discussion in Michigan v. Jackson, ___ U.S. ___, 106 S. Ct. 1404 (1986). A series of recent Supreme Court cases, including Moran v. Burbine and Michigan v. Jackson, supra, have discussed when and under what circumstances a suspect's Sixth Amendment right to counsel attaches.

One decision is particularly close to the facts in the instant case. In Maine v. Moulton, 106 S. Ct. 477 (1985), a suspect had been indicted for one crime, but was out on bond awaiting trial. A co-defendant offered to act as an informer and police arranged to record conversations between the two men. Evidence was gathered in this manner both as to the first crime and as to a second, planned crime. The Court, in a decision written by Justice Brennan, held that the information gathered in this manner was inadmissible as to the first crime because the suspect's Sixth Amendment right to counsel had attached when he was formally charged with the crime, and thereafter, police could not act in any way which circumvented that right. The Court also held, however, that the evidence gathered as to the second crime would be admissible in a trial on those charges, because the right to counsel had not yet attached as to that crime. Maine v. Moulton, supra, n. 16. In short, the Sixth Amendment right to counsel attaches separately for each crime, and its existence for one charge does not "carry over" to another charge.

In the instant case, petitioner's separate right to counsel under the Sixth Amendment had attached as to the unrelated assault charge, but as to the murder charge, no event which triggers the right to counsel had yet occurred.[3]

B. Petitioner's Fifth Amendment Rights.

Petitioner's Fifth Amendment rights attached, however, at the time of his arrest, when he was taken into custody. Part of

[3] The arrest warrant was not issued until after petitioner gave a statement. (App. 437-440).

petitioner's Fifth Amendment rights include the right to counsel to protect his privilege against self-incrimination, but that right may be waived along with other protections offered by the Fifth Amendment. North Carolina v. Butler, 441 U.S. 369 (1979).

One question is whether police had the right to initiate questioning about the murder knowing petitioner had retained an attorney for the assault charge. Police may reinstitute questioning after a suspect has requested an attorney, as long as an attorney has been available to the suspect in the interim. U.S. v. Halliday, 658 F.2d 1103 (5th Cir. 1981), cert. denied, 454 U.S. 1127 (1981). In short, if a suspect requests an attorney and is allowed to see one, police may thereafter attempt further questioning despite the absence of counsel.[4] The suspect still has the right to remain silent or to terminate the questioning, but police are not prohibited from periodically inquiring if the suspect will talk. Michigan v. Mosley, 423 U.S. 96 (1975). In Mosley, a suspect arrested on a robbery charge was given his Miranda warnings and specifically declined to talk to police officers. Several hours later, he was again given his Miranda warnings and questioned about a murder, to which he confessed. Mosley, supra, at 98. The Court allowed the use of that confession because Mosley never attempted to invoke his Fifth Amendment rights during the second questioning about a

[4] Most fact situations in the cases reviewed are similar to the situation here. The defendant's attorney was not present, but defendant did not request his presence, in spite of being given another set of Miranda warnings, nor did defendant attempt to cut off questioning in any other manner.

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different crime. Specifically, the second interrogation did not undercut defendant's earlier decision not to answer inquiries about the first crime, and the questioning focused only on a crime different in time, place and nature from the first crime.

Petitioner refers this Court to United States, ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir. 1987). For purposes of this inquiry, whether police may initiate an interrogation after the Fifth Amendment right to counsel has attached, Espinoza presents an identical factual situation to the instant case. The Seventh Circuit Court of Appeals affirmed the habeas relief granted below for different reasons. The court of appeals granted relief on the ground that the police violated Espinoza's Fifth Amendment right to counsel by initiating an interrogation after Espinoza had impliedly invoked his Fifth Amendment right to counsel by accepting an attorney at a previous arraignment on an unrelated charge. The Court held that Espinoza's waiver, even if otherwise valid, was ineffective since the police violated the prophylactic rule established by Edwards v. Arizona, 451 U.S. 477 (1981), when they initiated the interrogation.

This Court need not consider the propriety of the principles established in Espinoza inasmuch as the underlying ruling in Edwards v. Arizona may not be applied retroactively. Solem v. Stumes, 465 U.S. 638 (1984). Petitioner was convicted January 24, 1981. The sentencing phase of his trial was concluded on January 26, 1981. Edwards was decided May 18, 1981.

Having concluded that the police did not wrongfully reinstitute questioning, the next issues that must be resolved

are whether petitioner made both a voluntary and a knowing and intelligent waiver of his Fifth Amendment right to counsel. These are separate inquiries. Wilson v. Murray, 806 F.2d 1232 (4th Cir. 1986).

A confession cannot be held involuntary and therefore inadmissible under the Due Process Clause unless it is linked to coercion by government agents. Colorado v. Connelly, ___ U.S. ___, 107 S. Ct. 523 (1986).

Many of the crucial facts concerning this inquiry are disputed. The police repeatedly testified that they read and explained petitioner's Miranda rights to him. The officers also stated that neither verbal nor physical abuse occurred during the interrogation. Furthermore, they contended, no one officer was ever alone with the petitioner. Ostensibly, the reason for this policy is to guard against the coercive conduct alleged here by an overzealous officer.

In direct contradiction, the petitioner testified that he was beaten and verbally abused. His statements regarding physical abuse are significantly undermined by the fact that his attorney visited the petitioner within one hour of his return to jail. (Tr. 108). Despite this narrow time lapse the attorney did not attempt to testify about the petitioner's condition at that time or the presence of any marks from the alleged abuse. Petitioner's credibility is hampered further by his inconsistent statements relating to advice from his attorney. At the suppression hearing the petitioner did not remember his attorney telling him not to speak to the officers. (Tr. 96, ln. 25). Yet

at the post-conviction relief hearing, he clearly remembered the admonition. (App. 222, ln. 8).

An undisputed fact of importance remains that the petitioner signed two waiver of rights forms.

According to Miller v. Fenton, ___ U.S. ___, 106 S. Ct. at 451 (1986), a trial judge's conclusion that the police did not engage in intimidation tactics is entitled to the § 2254(d) presumption of correctness. At the suppression hearing the trial judge ruled that the confession was voluntary. (Tr. 121).

This Court concludes based on the record and the trial judge's ruling that the statements were voluntarily given.

We must next consider whether the waiver of the right to counsel was a knowing and intelligent waiver. We need not decide whether petitioner's decision was wise, but only whether it was made with an understanding of the protections involved.

According to the police, Butler was alert and responsive throughout the interrogation. (Tr. 42, 62, 63, 70). He appeared to understand and assented to his understanding of his Miranda rights as those rights were explained to him. (Tr. 44-45). Despite the petitioner's statements at his post-conviction relief hearing that he did not know what a confession or a jury trial were (App. 229-230), this Court concludes that Butler possessed the ability to understand and comprehend his legal rights. Both the petitioner and his attorney indicated that Butler actively participated in his trial and the negotiations preceding the trial. Petitioner discussed the following topics at length with his attorney: the events of his interrogation (App. 229-230),

guilty plea negotiations (App. 234-235), selection of witnesses and the substance of their testimony (App. 231-232) and the strategic implications of his testimony (App. 237).

Additionally, the petitioner and his elementary school principal, Isiah Frazier, testified tht he possessed some literacy skills. (App. 208; Tr. 93). Lastly, the petitioner was not unfamiliar with police procedure. He testified that he had been arrested on four previous occasions. (Tr. 104).

Based on this testimony, this Court concludes that the petitioner made a knowing waiver of his right to counsel. Having made a valid waiver of his Fifth Amendment rights, petitioner was not entitled to an attorney under the Fifth Amendment. His Sixth Amendment right to counsel had not yet attached for the murder charge since no formal proceedings in the prosecution of that charge had been instituted.

CONCLUSION

After reviewing the record, the applicable law, and the Magistrate's Report, which is hereby adopted in full, the Court finds that there is no genuine issue as to any material fact and that the respondents are entitled to judgment as a matter of law.

IT IS, THEREFORE, ORDERED that the respondents' motion for summary judgment be and hereby is granted and this case is dismissed.

IT IS SO ORDERED.

G. Ross Anderson Jr.
G. ROSS ANDERSON, JR.
UNITED STATES DISTRICT JUDGE

Anderson, South Carolina
June 5th, 1987.

A TRUE COPY
Attest: Ann A. Birch, Clerk
By: _____
Deputy Clerk

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APPENDIX B

that might have sent mixed signals regarding his continuing right to request counsel. Certainly, if Butler had been released on bond and then rearrested an hour later on murder charges, the authorities would have been permitted to engage in proper interrogation. We see no reason for a different result simply because the custody was continuous.

Properly initiated interrogation on entirely new charges does not intrude into an accused's previously invoked rights but rather offers that accused an opportunity to weigh his rights intelligently in light of changed circumstances. When, as occurred in this case, the accused then freely waives any constitutional right to counsel and provides voluntary statements of an incriminating nature, there is no justification for undermining the search for truth by suppressing those statements.

Unlike the Seventh Circuit, we perceive no conflict between this conclusion and the Supreme Court's reasoning in *Colorado v. Spring, supra*. A voluntary waiver of rights by an accused in custody conclusively demonstrates that the accused does not find the general custodial atmosphere unduly coercive. The coercive nature of the custodial environment does not change simply because the subject of the interrogation shifts. There is, therefore, as the Court in *Spring* recognized, no reason why the authorities should renew the *Miranda* warnings each time a new topic is raised in interrogation. The accused has received all of the "prophylactic" protection to which he is entitled.

The scope of the invoked fifth amendment right to counsel presents an entirely distinct conceptual issue. The question is no longer whether the authorities have met their responsibility, but whether the accused wishes to deal with the authorities personally or through counsel. Knowledge of the charges is clearly relevant in this area. Logically, the decision to seek counsel may change depending upon the accused's assessment of his circumstances. There is, therefore, no compelling reason to assume that the invocation of a right to counsel on one offense automatically applies to later charges brought to the attention of the accused. Certainly, there is no reason why the authorities cannot, at least, inquire if the accused wishes to deal with the new charges through counsel.

This Court has recently expressed serious reservations concerning the use of *per se* reversal rules in federal habeas proceedings. *Perry v. Leeke*, 832 F.2d 837 (4th Cir.), *cert. granted*, — U.S. ——, 108 S.Ct. 1269, 99 L.Ed.2d 480 (1988). While a federal habeas court must ensure that a petitioner's constitutional rights have been scrupulously observed, it must also be aware of societal cost attendant to a reversal of a state criminal conviction. Fidelity to the law, of course, demands adherence to established "bright line" *per se* rules such as that articulated in *Edwards* even when they result in reversal of otherwise valid criminal convictions. Unlike the Seventh Circuit, however, we are not inclined to extend those rules to circumstances where they are unjustified and unnecessary.

III.

We are, therefore, fully satisfied that petitioner's confessions, preceded by appropriate warnings and a voluntary waiver of fifth amendment protections, were not obtained in violation of his constitutional rights or the prophylactic rule of *Edwards v. Arizona*. Accordingly, the denial of habeas relief to petitioner is affirmed.

AFFIRMED.

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Corp., 198 Va. at 160, 93 S.E.2d at 279. As the district court noted, while the references to the order of events may not be entirely accurate, the quoted portions of the sentences are accurate quotes and the sentences themselves are substantially correct accounts of the trial testimony. Though a showing of actual malice by clear and convincing evidence could overcome privilege, *see The Gazette, Inc. v. Harris*, 229 Va. 1, 18, 325 S.E.2d 713, 727 (1985), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3513, 87 L.Ed.2d 643 (1985), there is nothing in the record before us from which we could infer malice. Therefore, the qualified privilege applies and the summary judgment in favor of The New Yorker is hereby affirmed.

AFFIRMED IN PART, REMANDED IN PART.

Horace BUTLER, Petitioner-Appellant,

v.

James AIKEN, Warden, Central Correctional Institute; Travis Medlock, Attorney General, State of South Carolina, Respondents-Appellees.

No. 87-4004.

United States Court of Appeals, Fourth Circuit.

Argued Jan. 7, 1988.

Decided May 6, 1988.

Defendant petitioned for habeas corpus relief alleging errors in state murder trial which resulted in his conviction and death sentence. The United States District Court for the District of South Carolina, George Ross Anderson, Jr., J., dismissed petition. Defendant appealed. The Court of Appeals, K.K. Hall, Circuit Judge, held that police-initiated questioning of defendant about murder did not intrude on defendant's previously invoked right to counsel on unrelated charge of assault where arrest on assault charges was not a sham and there was no reinterrogation on same offense.

Affirmed.

1. Courts ⇐100(1)

Rule in *Edwards v. Arizona* that accused is not subject to further police-initiated interrogation, after he has expressed desire to deal with police only through counsel, until counsel has been made available to him, although not retroactive, does apply to cases pending on direct appeal at time it was announced by United States Supreme Court. U.S.C.A. Const.Amend. 5.

2. Criminal Law ⇐412.2(4)

Police-initiated questioning of suspect about murder did not intrude on suspect's previously invoked right to counsel on unrelated charge of assault and battery where arrest on assault charges was not a sham and there was no reinterrogation on same offense. U.S.C.A. Const.Amend. 5.

Dale Thomas Cobb, Jr. (Belk, Howard, Cobb & Chandler, P.A., on brief). for petitioner-appellant.

Donald John Zelenka, Chief Deputy Atty. Gen., for respondents-appellees.

Before RUSSELL, HALL, and CHAPMAN, Circuit Judges.

K.K. HALL, Circuit Judge:

Horace Butler, a South Carolina inmate currently awaiting execution for the crime of murder, appeals an order of the district court dismissing his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. We affirm.

I.

Butler was tried by a South Carolina state court in 1981 for the 1980 murder of Pamela Lane. According to the facts developed at trial, Lane, a clerk at a convenience store north of Charleston, South Carolina, was last seen alive when she left her place of employment at approximately 10:30 p.m. on July 17, 1980. At that time, she was riding a new moped that had been delivered to her earlier that evening. She never arrived at her home.

The next morning, Lane's sister reported her disappearance to the authorities. A few hours later, near a bridge, fishermen discovered a body which was subsequently identified as that of Pamela Lane. She had been shot once in the chest by a small caliber gun. The following day a local minister found a moped submerged in a pond behind his church. The moped was identified as the one Lane was riding when last seen.

On August 30, 1980, Butler was arrested on an unrelated charge of assault and battery and placed in the Charleston County Jail. Butler retained local counsel who appeared with him at a bond hearing on August 31, 1980. He was unable to make bond, however, and was returned to custody in the County Jail. Butler's attorney would later contend in state post-conviction proceedings that he directed police officers not to question Butler further. The officers, however, testified that they remembered no such instruction.

At approximately 12:15 a.m. on September 1, 1980, Butler was taken from the jail and transported to the Charleston County Police Department. He was then informed for the first time that he was under suspicion for the murder of Pamela Lane. After receiving the warnings regarding his constitutional protection against compulsory self-incrimination, as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), Butler indicated that he understood his rights and signed two separate waiver forms. At no time during the ensuing interrogation did Butler request the presence of his attorney.

Butler subsequently offered two explanations of Lane's death. In his first confession, he claimed that a friend, Larry White, had killed Lane and then sought his help in disposing of the moped. When police told Butler that they did not believe the story, he offered a second confession in which he admitted to killing Lane. According to the second confession, Butler saw Lane riding on her moped and followed her. When he blinked his automobile lights at her, she pulled off the road, hid the moped in the bushes, and voluntarily accompanied him in a drive to a nearby wooded area. Butler claimed that Lane engaged in consensual sex with him and then threatened to "cry rape" when she realized that she would be late getting home. Butler maintained that he panicked, shot Lane with a handgun in his possession, and then dumped her body off a bridge. He further claimed that Larry White helped him dispose of the moped. Butler later took police to the area where the events allegedly occurred and identified the location of Lane's death.

Butler was subsequently indicted and brought to trial on the charge of murder in the first degree. After a motion to suppress his custodial statements was denied, his two confessions to the Charleston police were introduced into evidence. The jury found him guilty of Lane's murder and, in a separate proceeding, sentenced him to death after concluding the murder had occurred while the defendant was engaged in the crime of rape.

Butler's conviction was upheld on direct appeal to the South Carolina Supreme Court in 1982. A petition for a writ of certiorari was denied by the United States Supreme Court in that same year. In 1983, Butler unsuccessfully petitioned for state post-conviction relief. That denial of relief was also affirmed by the South Carolina Supreme Court, and the United States Supreme Court again denied a petition for certiorari. Butler thereby exhausted his available state remedies.

On May 2, 1986, Butler filed the instant petition for federal habeas relief pursuant to 28 U.S.C. § 2254. The matter was referred to the United States Magistrate for

report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). On May 9, 1987, the magistrate issued his report finding no basis for granting relief to Butler. The magistrate also recommended that a motion for summary judgment presented on behalf of the respondent state officials be granted. After conducting a lengthy *de novo* review of all portions of the magistrate's report to which Butler had objected, the district court also concluded that petitioner did not merit habeas relief. Accordingly, the district court granted the respondent's motion for summary judgment and dismissed the petition. This appeal followed.

II.

On appeal, petitioner contends that he is entitled to habeas relief because (1) his counsel in the proceedings below was constitutionally ineffective; (2) errors in the jury selection process violated his rights under the sixth and fourteenth amendments; (3) his two confessions were improperly admitted at trial; (4) the jury at his trial was improperly instructed; (5) the prosecution's use of rape as an aggravating circumstance justifying the death penalty was improper; and (6) the state of South Carolina failed to conduct an adequate proportionality review of his case to determine whether the death penalty was the appropriate punishment. All of these contentions were exhaustively considered and rejected by the district court. We find the district court's analysis sound and persuasive in all respects save its treatment of the admissibility of petitioner's confessions. On that single issue, we conclude that some further discussion is necessary. On all other claims advanced by petitioner, however, we affirm the denial of habeas relief for the reasons expressed by the district court. *Horace Butler v. James Aiken, Warden, Central Correctional Institution, and Travis Medlock, Attorney General, State of South Carolina*, C/A No. 86-1093-3 (D.S.C. June 9, 1987).

With regard to his confessions, Butler contends that the statements elicited from him by the Charleston Police on September 1, 1980, were obtained in violation of his fifth amendment right to counsel. He concedes that the warnings mandated by *Miranda v. Arizona, supra*, were given before any interrogation concerning Lane's death occurred. He further concedes that he signed waivers in which he agreed to permit police questioning without the presence of an attorney. Petitioner argues, however, that under the "bright line" rule established in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the undisputed invocation of his fifth amendment right to counsel when he was first arrested barred the police from initiating any further uncounseled interrogation. The waiver forms were, in petitioner's view, presumptively invalid.

[1] Noting that Butler's trial had preceded the decision in *Edwards* and that the Supreme Court in *Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984), had rejected retroactive application of the rule articulated in *Edwards*, the district court summarily rejected this portion of Butler's petition. Unfortunately, the district court's failure to address this claim on the merits must be regarded as error. Although *Edwards* does not have retroactive effect, it does apply to cases pending on direct appeal at the time it was announced. *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985). Butler's appeal was in fact pending at that time. We must, therefore, consider whether Butler's interrogation did produce incriminating statements in violation of his constitutional right to counsel. We are convinced that it did not.

[2] An immediate factual distinction may be drawn between Butler's interrogation and that of the criminal defendant in *Edwards*. The defendant therein was arrested on charges of first degree murder. After some preliminary questioning, he terminated the interrogation by requesting an attorney. The next morning, police officers approached the defendant and without

providing counsel, renewed questioning on the very offense on which he had previously requested counsel. In requiring suppression of the resulting confession, the Supreme Court held that when an accused has expressed a desire to deal with the police only through counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484-85, 101 S.Ct. at 1885.

In the instant case, the Charleston police did not attempt to renew their inquiry into the assault and battery charges on which Butler had been arrested. Rather, the questioning initiated on September 1, 1980, dealt only with a hitherto uncharged offense—the murder of Pamela Lane. Not surprisingly, Butler argues on appeal that this factual distinction is irrelevant to the constitutional inquiry. Relying upon a recent decision from the Seventh Circuit, Butler contends that the correct application of *Edwards* requires that during continuous custody, the police refrain from any further questioning once an accused has invoked a right to counsel on any offense. *See United States ex rel Espinoza v. Fairman*, 813 F.2d 117 (7th Cir.1987). We are not persuaded, however, by the Seventh Circuit's dramatic extension of *Edwards*.

The fifth amendment right to counsel exists throughout the time that an accused is in police custody in contrast to the protection provided by the sixth amendment which arises only when formal proceedings are begun—when the individual becomes the accused.[1] *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). The court in *Espinoza* reasoned that since the right to counsel extended continuously through a period of custody, the invocation of that right, as protected by *Edwards*, must be of similar duration. The court further reasoned that requiring a crime-by-crime invocation of the fifth amendment right would be inconsistent with the decision in *Colorado v. Spring*, 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987) (waiver of fifth amendment right at the beginning of interrogation remains valid even if police questioning moves without warning from crime on which defendant was arrested to an entirely different offense). Although superficially appealing, we are convinced that the decision of the Seventh Circuit pursues a false symmetry while cutting the decision in *Edwards* away from its conceptual base.

As the Supreme Court has observed, the "prophylactic rule" adopted in *Edwards* "has only a tangential relation to truthfinding." *Solem*, 465 U.S. at 642, 104 S.Ct. at 1341. It was articulated as a reflection of the Court's belief that additional procedural safeguards were needed to protect an accused's preexisting right to request counsel during custodial interrogation. *Id.* at 645, 104 S.Ct. at 1342. Such "safeguards" by their inherent nature are a judicial response to specific and identifiable conditions that undermine the perceived integrity of the legal system. In *Miranda*, for example, the Court sought to insure that statements made by an accused while in the unavoidably coercive atmosphere of custodial interrogation could reasonably be viewed as truly voluntary. In *Edwards*, the Court's concern lay with police conduct that might badger an accused into abandoning a previously invoked right.

We fail to see how the actions of the Charleston police could fall within the intent of the Court in *Edwards*. There is no suggestion that Butler's arrest on the assault charges was a sham intended to make him available for questioning upon a more serious offense. Neither was there "reinterrogation" on the same offense, *Edwards*, 451 U.S. at 485, 101 S.Ct. at 1885,

1. On September 1, 1980, Butler unquestionably possessed a sixth amendment right to counsel with regard to the offense on which he had been arrested and denied bond. No formal charges had been filed against him in connection with Lane's death, however, and thus no sixth amendment right had arisen in that area. For that reason, it is essentially irrelevant whether Butler's counsel in fact instructed police not to question him further.

APPENDIX C

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U.S. Court of Appeals
Fourth Court

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-4004

Horace Butler

Petitioner - Appellant

versus

James Aiken, Warden, Central Correctional Institute, Travis Medlock, Attorney General, State of South Carolina

Respondents - Appellees

ORDER

Before the Court for reconsideration is Horace Butler's petition for rehearing with regard to his appeal of the district court's order denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Butler, a South Carolina inmate, was convicted in state court in 1981 for the 1980 murder of Pamela Lane. After exhausting state remedies, Butler petitioned for federal habeas relief asserting a broad range of constitutional objections to the state criminal proceedings. Finding no merit in any of his claims, the district court denied relief and we affirmed. Butler v. Aiken, No. 87-4004 (4th Cir. May 6, 1988). A petition for rehearing and suggestion of rehearing en banc was subsequently denied on June 15, 1988.

In our opinion, we rejected the bulk of Butler's contentions for the reasons soundly expressed below by the district court. We addressed, in detail, only Butler's claim that his confession resulting from interrogation on murder charges following his arrest and appearance with counsel on an unrelated offense violated the "bright line" rule against reinterrogation established in Edwards v. Arizona, 451 U.S. 477 (1981). Our conclusion that Edwards does not bar such interrogation if properly preceded by appropriate warning and waiver in accordance with Miranda v. Arizona, 384 U.S. 486, was cast into immediate and serious doubt by the Supreme Court's decision in Arizona v. Roberson, 56 U.S.L.W. 4590 (U.S. June 15, 1988). The Roberson Court expressly held that the Edwards rule does bar police initiated interrogation following a suspect's request for counsel in the context of a separate investigation. 56 U.S.L.W. 4593.

In light of Roberson, we determined that Butler's petition for rehearing should be reconsidered. Accordingly, we directed petitioner and respondents to file supplemental briefs on this issue. We have now received and examined that supplemental briefing. The petition for rehearing is, therefore, ripe for disposition.

As an initial matter, we reject respondents' effort to distinguish Roberson factually. We assume for purposes of decision that the appearance of counsel with Butler at a bond hearing on the assault charge for which he was first arrested conclusively demonstrated invocation of Butler's fifth amendment rights. The subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the Edwards rule as modified in Roberson. If this case were before us on direct appeal, we would in all likelihood be compelled to reverse the conviction and remand for a new trial. It does not follow, however, that Butler is entitled to habeas relief based upon a rule of law that was not in effect at the time of his arrest and trial.

The retroactive effect of decisions such as Roberson in collateral proceedings is determined in accordance with three factors: (1) the purpose of the new rule of law; (2) the extent of reliance by law enforcement authorities on the old standard; and (3) the effect of retroactive application upon the administration of justice. Allen v. Hardy, ___ U.S. ___, 106 S.Ct. 2878, 2880 (1986). Although all are relevant, it is the first factor that is perhaps the most important for it is only when the new judicial formulation "enhances the accuracy of criminal trials" and "goes to the heart of the truth finding function," Solem v. Stumes, 465 U.S. 638, 643-45 (1984), that retroactivity is most appropriate.

Applying this test to the instant case, we are fully satisfied that Butler may not claim any retroactive benefit from Roberson. The Edwards-Roberson limitations on police interrogation have only the most tangential relationship to truth finding. They are, rather, a part of the prophylactic protection accorded the fifth amendment right to counsel as a means of establishing "guidelines to the law enforcement profession." Roberson, 56 U.S.L.W. at 4592. The interrogation of appellant, while unques-

tionably contrary to the present "guidelines, was conducted in strict accordance with established law in 1980. We, therefore, conclude that Butler may challenge his presumptively valid conviction only by demonstrating that there was an actual violation of his constitutional rights in 1980. On that dispositive issue, the record discloses no support for Butler's claim for habeas relief.

It is undisputed that local authorities provided full Miranda warnings before questioning Butler on the Lane murder. It is further undisputed that Butler twice evidenced his knowing consent to interrogation without the presence of counsel by executing signed waivers. Every court that has considered this matter has concluded that the waiver of rights was uncoerced and utterly voluntary. There is, therefore, no reason to find a technical violation based upon newly announced law when the record reveals that appellant freely waived any fifth amendment protections in 1980.

For the foregoing reasons, we conclude that our initial affirmance of the district court's decision in this matter was appropriate in substance.

In a requested poll of the Court on the suggestion for rehearing en banc, Chief Judge Winter, Judge Phillips, Judge Murnaghan, Judge Sprouse, and Judge Ervin voted to rehear the case en banc; and Judge Russell, Judge Widener, Judge Hall, Judge Chapman, Judge Wilkinson, and Judge Wilkins voted against rehearing en banc.

As the panel has considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing en banc, it is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

ENTERED with the concurrences of Judge Russell and Judge Chapman.

/s/ K. K. Hall

K. K. Hall
U. S. Circuit Judge

WINTER, Chief Judge, dissenting:

I respectfully dissent from the denial of rehearing in banc because I believe that Butler's conviction was obtained in violation of applicable constitutional law. A life is at stake in this case. I have no doubt, therefore, that the validity of Butler's conviction presents a question of "exceptional importance." F. R. App. P. 35(a).

I.

As the majority correctly states, Butler requested counsel when questioned about the offense for which the authorities were holding him. Shortly thereafter, and in the absence of that counsel, Butler was interrogated about an unrelated offense. The government obtained from him self-incriminating statements about the unrelated offense. There is no evidence that Butler initiated the interrogation that resulted in his self-incriminating statements. He was convicted by the use of those statements.

The majority expresses the view that if Butler's case were before it on direct appeal, it would "in all likelihood" be compelled to reverse the conviction and remand for a new trial. But, the majority maintains, because Butler's case is before it on denial of a petition for habeas corpus, he is not entitled to relief, as the rule of law on which he relies to bar the use of his uncounselled confession was not in effect at the time of his arrest and trial. Specifically, the majority's view is that an interrogation such as Butler's did not violate Edwards v.

Arizona, 451 U.S. 477 (1981), until Edwards was "modified" in Arizona v. Roberson, 486 U.S. ___ (June 15, 1988). Because Roberson was not decided until after Butler's conviction became final, Butler is entitled to invoke Roberson, in the view of the majority, only if Roberson is held to be retroactive. The majority concludes that Roberson does not meet the test for retroactive application.

In making Butler's entitlement to relief depend upon the retroactivity of Roberson, the majority, in my view, incorrectly construes both Edwards and Roberson.

II.

Imprimis, I think that Butler's confession was constitutionally inadmissible under Edwards standing alone. Edwards stated unconditionally that a suspect who has "expressed his desire to deal with police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication." 451 U.S. at 484-85. It is true that, in Edwards, the subject about which the accused was wrongly interrogated was the crime for which the authorities were holding him. But there is not the slightest suggestion in the Court's opinion that its holding was limited by the subject of the interrogation. Indeed, the Court in Edwards expressly reconfirmed its previous characterization of the rule in Miranda v. Arizona, 384 U.S. 436 (1966), as a command that, upon an accused's request for counsel, "all interrogation cease." Edwards, 451 U.S. at 485 (quoting Fare v. Michael C., 442 U.S. 707, 719 (1979) (emphasis added)).

Edwards was decided before Butler's trial. And even when decided, Edwards did not purport to create new law. Edwards was simply a reconfirmation of the guideline articulated in Miranda that if a person held for interrogation "states that he wants an attorney, the interrogation must cease until an attorney is present." Miranda, 384 U.S. at 474. Nothing in Miranda indicated that application of this rule was to vary with the subject of the interrogation.

In Edwards, the Court reviewed Miranda and subsequent cases recapitulating "Miranda's 'rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease.'" Edwards, 451 U.S. at 485 (quoting Fare, 442 U.S. at 719 (emphasis added)). Upon so doing, the Court concluded:

> We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.

Id. Thus, the Edwards Court did not regard its holding as other than a "reconfirmation" of Miranda.

Roberson did not alter these rules of law. It simply rejected Arizona's attempt to change the rules. In the very opening paragraph of the Court's opinion, Justice Stevens, writing for the majority, described the case as one in which "Arizona asks us to craft an exception [to the Edwards rule] for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation." 486 U.S. at ___. This the Court declined to do.

Instead, it expressed agreement with an earlier Arizona decision holding that Edwards was equally applicable whether the interrogation was about either the offense giving rise to the arrest or an unrelated offense. The opinion then documented how the Court had never departed from its holding in Miranda, as reconfirmed in Edwards, and set forth the reasons why it would not do so in the case before it.

In sum, Roberson says that the law is and has been, since Miranda, that a suspect who has expressed his desire to deal with the police only through counsel is not subject to further interrogation about either the crime he is suspected of having committed or any other crime until counsel has been made available, unless the suspect initiates further communication with the police.* There is thus no retroactivity issue presented in the instant case. Butler merely seeks to invoke the law in effect when he was tried and convicted. I think that he has the right to do so, and that he is entitled to habeas relief.

Judges Phillips, Murnaghan, Sprouse and Ervin authorize me to say that they join in this dissent.

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* My reading is reinforced by what Justice Kennedy, who was joined by the Chief Justice, wrote in dissent in Roberson. He rejected the majority's characterization of the case as one in which the Court was asked to "craft an exception" to Edwards. He asserted instead that Roberson was the first case in which the Court was "asked to apply Edwards to separate and independent investigations." 486 U.S. at ___. While the majority in the instant case obviously prefers this characterization of Roberson, I remind the majority that, as an inferior appellate court, we are bound to follow the Supreme Court majority, whether we agree or disagree.

ORIGINAL

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE
SUPREME COURT OF THE UNITED STATES

No. 88-6677

October Term 1988

HORACE BUTLER,

Petitioner,

vs

JAMES AIKEN, WARDEN, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA, T. TRAVIS MEDLOCK,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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RESPONDENTS' QUESTION PRESENTED

I.

Whether the situation presented where a suspect never requested the assistance of counsel during any interrogation, though counsel had met with the suspect prior to the interrogation, is factually distinguishable from Arizona v. Roberson, __U.S.__, 108 S.Ct. 2093 (1988)?

II.

Whether Arizona v. Roberson, supra, is to be applied retroactively to cases on federal habeas corpus review at the time the decision was announced?

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 88-6674

October Term 1988

HORACE BUTLER,

Petitioner,

vs

JAMES AIKEN, WARDEN, AND
THE ATTORNEY GENERAL OF
SOUTH CAROLINA, T. TRAVIS
MEDLOCK,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

The Respondents, above named, hereby make Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and would present the following:

CITATION TO OPINIONS BELOW

The opinion of the District Court for the District of South Carolina, Butler v. Aiken, C/A No. 86-1093-3 (D.S.C. June 9, 1987), denying Butler's Petition for a Writ of Habeas Corpus is unreported, and may be found at J.A. 1606. A copy of the District Court's opinion is attached to the Petition as Appendix A. The initial panel opinion of the United States Court of Appeals for the Fourth Circuit, affirming the denial of a Writ of Habeas Corpus, is reported as Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988), and is attached to the Petition as Appendix B. The Order of the

Court of Appeals denying rehearing and rehearing en banc is unreported. Butler v. Aiken, No. 87-4004 (4th Cir. June 15, 1988). The Order of the United States Court of Appeals for the Fourth Circuit on reconsideration of the Order denying rehearing, and denying rehearing en banc, concluding that the initial affirmance of the District Court decision was appropriate in substance and denying the Petition for Rehearing and Suggestion for Rehearing En Banc, is reported as Butler v. Aiken, No. 87-4004 (4th Cir. December 12, 1988). A copy of the Order is attached to the Petition as Appendix C.

JURISDICTION

The Order of the United States Court of Appeals for the Fourth Circuit denying the Petition for Rehearing with Suggestion for Rehearing En Banc was entered December 2, 1988. This Court's jurisdiction is apparently invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ....

COUNTER-STATEMENT OF THE CASE

This matter comes before this Court on federal habeas corpus proceedings arising from a 1981 murder conviction in South Carolina that resulted in a sentence of death on the Petitioner, Horace Butler. The situation involves the July 17, 1980, murder of Pamela Lane in Charleston County, South Carolina.

Miss Lane, a clerk at a convenience store, was last seen alive when she left her place of employment at around 10:30 p.m., on July 17, 1980. She was riding home alone for the first time on her new moped she received that day. She never arrived home.

Her sister reported her missing the next day. A few hours later, her body was discovered by fishermen near a bridge. She had been shot once in the chest by a small calibre pistol. The following day a minister found her moped in a pond near his church.

On August 30, 1980, the Petitioner, Horace Butler, was arrested on an unrelated charge of assault and battery and placed in the County Jail. (J.A. p. 97). He received his "Miranda" warnings on that charge. (J.A. p. 45).

According to post conviction testimony, his sister was called by him and asked "to call Mr. Hill or have his father go see Mr. Hill (a local attorney)." (J.A. p. 1274). Hill was contacted and appeared with him at a bond hearing and agreed to become retained to represent him on the assault charge. He was unable to make bond and he was returned to the County Jail.

At approximately 12:15 a.m., on September 1, 1980, Butler was taken from the jail and transported to the Charleston County Police Department. He was then informed that he was being charged with the murder of Pamela Lane. After receiving the warnings regarding his constitutional rights as required by Miranda v. Arizona, 384 U.S. 436 (1966) (J.A. p. 46), he stated that he understood his rights and then signed two separate waivers during the interrogation. (J.A. pp. 46-50, 58). At no time during any of the interrogation did Butler request the presence of any attorney or particularly McAllister Hill.

Butler offered two explanations of Pamela Lane's death. In his first confession, he claimed that Larry White had killed Lane and sought his help in disposing of the moped. When the police questioned him further, he offered a second confession in which he admitted to killing Lane. According to this statement, he saw Lane riding on her moped and followed her. When he blinked his lights at her, she pulled off the road, hid the moped in the bushes, and voluntarily accompanied him to a nearby wooded area. Butler claimed that Lane engaged in consensual sex with him and said she would "cry rape" when she realized she would get home late. Butler contended that he panicked, shot Lane with a handgun in his possession, and then dumped her body off a bridge. He also claimed Larry White helped him dispose of the moped. After he signed the second confession at 5:45 a.m., he indicated he was not tired and voluntarily led officers to the scenes where he intercepted the victim, where the sexual intercourse and shooting occurred, and where he dumped the body. (J.A. 65). He was returned to jail at about 10:30 a.m., on September 1, 1980.

He was subsequently indicted and brought to trial on murder and sentenced to death. The confession was introduced in the guilt phase after a suppression hearing. Particularly, the trial court found that Butler was afforded his Fifth Amendment rights required by Miranda and that the statements were "voluntary, they were made without coercion on the part of the law enforcement officers, without any threat, without any promise, without any inducement to the defendant ... beyond any reasonable doubt." (J.A. p. 124). Butler's conviction and sentence was upheld on direct appeal. State v. Butler, 277 S.C. 452, 290 S.E.2d 4 (1982). (J.A. 1045). A Petition for Certiorari was denied on

October 12, 1982. In 1983, he unsuccessfully pursued state post conviction relief. The denial of relief was affirmed by the South Carolina Supreme Court and certiorari was again denied by this Court.

On May 2, 1986, Butler filed a Petition for a Writ of Habeas Corpus relief pursuant to 28 U.S.C. § 2254. After pleadings were timely filed, the United States District Court held that it need not consider the applicability of Edwards v. Arizona, 451 U.S. 477 (1981), because the trial had concluded before the Edwards opinion was rendered relying upon Solen v. Stumes, 465 U.S. 638 (1984). (J.A. p. 1640). The District Court granted the Respondents' Motion for Summary Judgment on all other grounds.

In the appeal from the Order of the District Court, the Fourth Circuit held in its panel decision, Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988), that the District Court erred in not applying Edwards, supra, retroactively because Butler's appeal was pending at the time of the decision. Nevertheless, it held that the actions of the Charleston police did not fall within the intent of Edwards. 846 F.2d at 258. It generally held that police initiated questioning about murder did not intrude on defendant's previously invoked right to counsel on an unrelated charge where it was not a sham arrest or "reinterrogation" on the same offense. The Petitioner made a Petition for Rehearing and a Suggestion for Rehearing En Banc that was denied on June 15, 1988. On that same date, this Court issued its decision in Arizona v. Roberson, __U.S.__, 108 S.Ct. 2093 (1988). The Fourth Circuit determined that Butler's Petition for Rehearing should be reconsidered and requested supplemental briefing. On December 2, 1988, the Fourth Circuit ordered that the Petition for Rehearing and

Suggestion for Rehearing En Banc was denied with the panel concluding that "our initial affirmance of the district court decision in this matter was appropriate in substance. (Petition, Appendix C, p. 5).

HOW THE FEDERAL QUESTION WAS DECIDED BELOW

The panel decision of May 6, 1988, found that the District Court erred in ruling that the mandate in Edwards v. Arizona, supra, did not apply to the Petitioner's case and concluded that it should be applied to the Petitioner's case. Butler v. Aiken, 846 F.2d 255, 257. The panel held that the confessions were not obtained in violation of the Fifth Amendment. Relating to the particular facts of this case, it stated:

> We fail to see how the actions of the Charleston police could fall within the intent of the Court in Edwards .... We see no reason for a different result simply because the custody was continuous.
>
> Properly initiated interrogation on entirely new charges does not intrude into an accused's previously invoked rights but rather offers that accused an opportunity to weigh his rights intelligently in light of changed circumstances. When, as occurred in this case, the accused then freely waives any constitutional right to counsel and provides voluntary statements of an incriminating nature, there is no justification for undermining the search for truth by suppressing those statements.

Id. at 258-259.

After the Petition for Rehearing and Suggestion for Rehearing En Banc was denied on June 15, 1988, the matter was reconsidered. Contrary to the assertions of the Petitioner, on December 2, 1988, the panel considered the Petition for Rehearing and was of the opinion that it should be denied. A majority of the active Court voted to deny

rehearing en banc, and it was adjudged and ordered that the Petition for Rehearing and Suggestion for Rehearing En Banc be denied. In its December 2, 1988, Order, Judge Hall stated: "As an initial matter, we reject respondents' effort to distinguish Roberson factually. We assume for purposes of decision that the appearance of counsel with Butler at a bond hearing on the assault charge for which he was arrested conclusively demonstrated invocation of his fifth amendment rights." The subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the Edwards rule as modified in Roberson. (Order, pp. 2-3). Of particular importance, the Order stated "if this case were before us on direct appeal, we would in all likelihood be compelled to reverse the conviction and remand for a new trial. It does not follow, however, that Butler is entitled to habeas relief based upon a rule of law that was not in effect at the time of his arrest and trial." (Order, p. 3). The Order stated that Butler may not claim any retroactive benefit from Roberson. Relying upon Allen v. Hardy, __U.S.__, 106 S.Ct. 2878, 2880 (1986), the Order stated that Petitioner could not benefit from Roberson.

> The Edwards-Roberson limitations on police interrogation have only the most tangential relationship to truth finding. They are, rather, a part of the prophylactic protection accorded the fifth amendment right to counsel as a means of establishing 'guidelines to the law enforcement profession.' Roberson, 56 U.S.L.W. at 4592. The interrogation of appellant, while unquestionably contrary to the present 'guidelines,' was conducted in strict accordance with established law in 1980 [the date of petitioner's arrest]. We, therefore, conclude that Butler may challenge his presumptively valid conviction only by demonstrating that there was an actual violation of his constitutional rights in 1980. On that dispositive issue, the record discloses no support for Butler's claim for habeas relief.

Order, pp. 3-4.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Arizona v. Roberson, __U.S.__, 108 S.Ct. 2093 (1988), is factually distinguishable from this case because Butler never invoked his right to have counsel present during any interrogation and retained counsel had met with the defendant prior to the questioning on the murder case.

In its Order denying the Petition for Rehearing, Judge Hall assumed for purposes of the Order that Roberson was not factually distinguishable. We submit that the rules in Edwards and Roberson are in fact factually distinguishable. The unique Order in which rehearing was denied presents these resolutions in the Order in a confusing state. Nevertheless, this Court has stated that a prevailing party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or Court of Appeals." Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n. 20 (1979). Accord Blum v. Bacon, 457 U.S. 132, 137 n. 5 (1982). For the reasons stated below, Respondents submit that certiorari should not be granted.

In Arizona v. Roberson, __U.S.__, 108 S.Ct. 2093 (1988), the Supreme Court held that its earlier test set forth in Edwards v. Arizona, 451 U.S. 477, 484-485 (1981), applies to situations when police want to interrogate a suspect about an offense that is unrelated to an offense that was the subject to their initial interrogation. At the outset, the Court held the Edwards test to be "that a suspect who has expressed his desire to deal with the police only through counsel is not subject to further interrogation until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversation with the police." In Roberson, after arresting Roberson at the scene of a burglary, the arresting

officer advised Roberson of his Miranda rights. Roberson replied that "he wanted a lawyer before answering any questions." The police did not interrogate him any further about that burglary. Three days later, another police officer, who was not aware that Roberson had previously requested a lawyer, advised him of his Miranda rights and obtained an incriminating statement from Roberson concerning a different burglary.

The Supreme Court in Roberson agreed with the state court in concluding that the statement should be suppressed as a denial of his Fifth Amendment right to counsel. It stated that there is no legal significance for Fifth Amendment to the factual distinction of questioning the accused about the same offense after a request for counsel or questioning the accused about an unrelated offense. The Court reasoned that a suspect's request for counsel during an interrogation should apply to any questions the police wish to pose relying upon Colorado v. Spring, 479 U.S. 564, 577 (1987). In Spring, the Supreme Court held that "a suspect's awareness of all the possible subjects of questioning in advance of interrogation is now relevant to determine whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." The Court, in Roberson, stated that Roberson's unwillingness to answer any questions without the advice of counsel, without limiting his request for counsel, indicated that he did not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney.

Respondents submit that the Petitioner in his Petition and the Order below has overlooked the difference between the Sixth Amendment right to counsel and the Fifth

Amendment right against self-incrimination. As stated in Roberson, the former arises from the fact that a suspect has been formally charged with a particular crime and thus is facing a state apparatus that has been geared up to prosecute him. The latter is protected by the prophylaxis of having an attorney present to counteract the inherent pressures of custodial interrogation, which arise from the fact of such interrogation and exist regardless of the number of crimes under investigation or whether those crimes have resulted in formal charges.

We submit that Roberson is inapplicable to the instant situation because of two reasons. Initially, unlike Roberson, Butler never invoked his Fifth Amendment right by requesting counsel during any interrogation for either crime. Roberson made a specific statement that he wanted a lawyer before answering any questions. Nowhere in this record does it appear that he invoked his right to remain silent or have counsel present during any further questioning. The record only reflects that counsel had been retained at the time of the bond hearing on the assault charge. The Sixth Amendment right had attached only to the assault charge on any interrogation arising from that charge. Accord Maine v. Moulton, 474 U.S. 159 (1985). In Moulton, the Court noted that even if the state has begun to prosecute an individual on one charge, subsequent "incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at the trial of those offenses." Moulton, supra, 106 S.Ct. 477, 490, n. 16.

Secondly, unlike Roberson, Edwards, or Michigan v. Jackson, 475 U.S. 625 (1986), in which counsel was requested but not provided in consultation, the Petitioner

here had counsel with him during the bond hearing. Simply put, counsel was "made available." Edwards emphasized the necessity of making counsel "available" or of the defendant having "access" to counsel, Edwards, supra, 451 U.S. 484-487, rather than holding that once the accused requests counsel he may thereafter be questioned only in the presence of counsel. See U.S. v. Missler, 414 F.2d 1293 (4th Cir. 1969) (after indictment on a different charge, defendant's incriminating statements made out of counsel's presence did not preclude admission of statement in prosecution for new crime committed after the earlier indictment). In U.S. v. Halliday, 658 F.2d 1103 (6th Cir. 1981), the court held the Fifth Amendment was not violated when counsel was "made available" after a request for counsel under Edwards. Also, the United States Supreme Court in Wyrick v. Fields, 459 U.S. 42 (1982) (per curiam), the Court limited Edwards to the extent that its language was interpreted to not require the "presence" of counsel at an interrogation after he had met with counsel. Cf. Roper v. State, 375 S.E.2d 600 (Ga. 1989).

In Boles v. Foltz, 816 F.2d 1132 (6th Cir. 1987), the Court rejected a Fifth Amendment challenge where a defendant advised the trial court at an arraignment that he had a lawyer and desired him to appear at a preliminary hearing on a larceny charge, but never sought to have him present during any interrogation on the other charges. The Sixth Circuit relied upon Connecticut v. Barratt, 479 U.S. 523 (1987). In Barratt, where a defendant stated he was willing to give an oral statement but would not give a written statement unless his attorney was present, invoked his right to counsel for purposes of the interrogation. In Boles, however, the Court found that he did not invoke his

right to have counsel present during an interrogation where his statement at the arraignment was that he wished to have his attorney present at the preliminary hearing.

In summary, Arizona v. Roberson should not affect this case because Horace Butler never invoked his Fifth Amendment right by requesting counsel to assist in any interrogation. Counsel merely appeared with his client at an unrelated bond hearing and consulted, although the information exchanged during the consultation has varied in the various proceedings. Since no Sixth Amendment right had attached on the murder charges and the Petitioner never sought to have counsel "made available" after his consultation after the bond hearing, we submit that the mandate of Roberson and Edwards has not been violated. Therefore, we submit that the Writ of Habeas Corpus was properly dismissed and denied because the Petitioner's constitutional rights were not infringed and certiorari should be denied.

2. Assuming that Roberson factually applies to the situation, the Fourth Circuit correctly stated in its Order. sua sponte, that it does not have retroactive application.

In its Order of December 3, 1988, denying the Petition for Rehearing and Suggestion for Rehearing En Banc, Judge Hall stated that "we are fully satisfied that Butler may not claim any retroactive benefit from Roberson." The Order concluded that the interrogation was conducted in strict accordance with established law in 1980, and that there was no support that there was an "actual violation of his constitutional rights in 1980." (Order, pp. 3-4). As the Order stated:

> It is undisputed that local authorities provided full Miranda warnings before questioning Butler on the Lane murder.

> It is further undisputed that Butler twice evidenced his knowing consent to interrogation without the presence of counsel by executing signed waivers. Every court that has considered this matter has concluded that the waiver of rights was uncoerced and utterly voluntary. There is, therefore, no reason to find a technical violation based upon newly announced law when the record reveals that the appellant freely waived any fifth amendment protections in 1980.

The Order of the Fourth Circuit reflects its sua sponte determination that the decision in Arizona v. Roberson, supra, established new guidelines for law enforcement and did not have more than the most tangential relationship to truth finding.

This Court has recently looked at retroactivity in its decision in Teague v. Lane, __U.S.__, 44 CRIM.L.RPTR. 3129 (February 22, 1989). Justice O'Connor wrote that in habeas corpus the issue of retroactivity should be a threshold question "for, once a new rule is applied to the defendant in the case announcing the rule, even-handed justice requires that it be applied retroactively to all those similarly situated." In her opinion, a new rule for retroactivity purposes is when it breaks new ground or imposes a new obligation on the States or Federal Government. "To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." 44 CRIM.L.RPTR. at 3133, citing Truesdale v. Aiken, 480 U.S. 527, 528-529 (1987) (Powell, J., dissenting).

In the habeas corpus context, Justice O'Connor's analysis adopted Justice Harlan's view of retroactivity set forth in Mackey v. U.S., 401 U.S. 667, 675 (1971), for cases on collateral review. Particularly, she noted the frustration of state courts to faithfully apply existing

constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands. In Teague, two exceptions to the general rule on nonretroactivity were stated:

> (1) a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe;" and
>
> (2) a new rule should be applied retroactively if it requires the observance of "those procedures that ... are implicit in the concept of ordered liberty."

For retroactivity analysis, the threshold question is whether the rule announced is a new rule. In Yates v. Aiken, 484 U.S.__ (1988), the Court held the rule announced in a habeas corpus setting in Francis v. Franklin, 471 U.S. 307 (1985), was not a "new rule" because it was merely an application of the principal that governed the decision in Sandstrom v. Montana, 442 U.S. 510 (1979). Accord Shea v. Louisiana, 470 U.S. 51 (1985) (giving Edwards retroactive application on direct but not collateral review).

Here, the Order below determined that the rule of Arizona v. Roberson announced a new rule by setting new guidelines for law enforcement officers by requiring the preclusion of any interrogation on unrelated conduct after a suspect in custody had invoked his right to counsel on the subject of his custody. The Supreme Court had never addressed that setting although some other state courts had held that it was not a constitutional violation. State v. Dampier, 314 N.C. 292, 333 S.E.2d 230 (1985); McFadden v. Commonwealth, 300 S.E.2d 924 (Va. 1983); Lofton v. State, 471 S.E.2d 1294 (Fla. App. 1985); State v. Newton, 682 P.2d 295 (Utah 1984). Roberson, supra, 108 S.Ct. 2093, 2097, n. 3. As Roberson acknowledged, the statements deemed

inadmissible in Edwards and later cases applying its doctrine were statements relating to the same investigation in which the right to counsel was invoked. Roberson, supra, at 2102. As the dissent in Roberson noted, this new rule will bar law enforcement officials, even those from other city, state or federal jurisdictions, from questioning a suspect about an unrelated matter if he is in custody and has requested counsel to assist in answering questions put to him about the crime for which he was arrested. Id.

The Petitioner contends that the lower court did not apply Edwards retroactively. (Petition, p. 11). We disagree. As stated in the panel decision, the Fourth Circuit unequivocally applied Edwards to the Butler - situation. 846 F.2d at 257. The Court, in reconsideration of the Petition for Rehearing, stated that it would not apply the mandate of this Court's decision in Roberson to the Butler setting.

Since Roberson established new guidelines for law enforcement, we submit that it should not be applied to collateral review since it does not fall within the two exceptions set forth in Justice O'Connor's opinion in Teague. Application of the rule in Roberson would not accord constitutional protection to any primary, private individual conduct nor create the watershed rule of criminal procedure Mackey, supra, was concerned with. Here, the suspect received oral warnings pursuant to Miranda and signed two written waivers of his constitutional rights, including his right to have counsel appointed or assist in the interrogation. In this record, at no time did he ever request counsel to assist the interrogation for this crime or the unrelated crime he was in custody for before or during the interrogation. Simply put, this case does not

present the concerns of "badgering" or coerciveness that Roberson was concerned with remedying. Now, almost nine years after the interrogations, the Petitioner seeks to have a technical change applied to him where the evidence is undisputed that he waived his right to have counsel assist. Certiorari on these issues, we submit, are unwarranted.

CONCLUSION

For all of the foregoing reasons, we submit that his Petition for Certiorari should be dismissed.

Respectfully submitted,

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Chief Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: [signature]

* Counsel of Record

April 7, 1989
Columbia, South Carolina

IN THE
SUPREME COURT OF THE UNITED STATES

No. 88-6674

October Term 1988

HORACE BUTLER,

Petitioner,

vs

JAMES AIKEN, WARDEN, AND
THE ATTORNEY GENERAL OF
SOUTH CAROLINA, T. TRAVIS
MEDLOCK,

Respondents.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit on the Petitioner by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to John H. Blume, Esquire, South Carolina Death Penalty Resource Center, Post Office Box 11311, Columbia, South Carolina 29211. He further certifies that all parties required to be served have been served.

This 7th day of April, 1989.

Donald J. Zelenka

SWORN to before me this

7th day of April, 1989.

(LS)
Notary Public for South Carolina
My Commission Expires: 4-14-97.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 88-6674

October Term 1988

HORACE BUTLER,

Petitioner,

vs

JAMES AIKEN, WARDEN, AND
THE ATTORNEY GENERAL OF
SOUTH CAROLINA, T. TRAVIS
MEDLOCK,

Respondents.

AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and ten copies of Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in the above captioned case by depositing same with Federal Express, prepaid, and properly addressed to the Clerk of this Court.

This 7th day of April, 1989.

Donald J. Zelenka

SWORN to before me this

7th day of April, 1989.

(LS)
Notary Public for South Carolina
My Commission Expires: 4-14-97.

Supreme Court, U.S.
FILED
APR 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-6677

HORACE BUTLER,

Petitioner,

v.

JAMES AIKEN, WARDEN, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA, T. TRAVIS MEDLOCK,

Respondent.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-6674

HORACE BUTLER,

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JAMES AIKEN, WARDEN, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA T. TRAVIS MEDLOCK,

Respondent.

PETITIONER'S REPLY BRIEF

ARGUMENT IN REPLY

Respondent asserts in its brief in opposition to the petition for writ of certiorari both that the facts of petitioner's case are distinguishable from those in Arizona v. Roberson, ___U.S.___, 108 S.Ct. 2903 (1988), and that Arizona v. Roberson is new law and should not be applied retroactively to petitioner's case. Because respondent's assertions are contradicted both by the facts of this case and by the established precedent of this Court, certiorari should be granted and the decision of the United States Court of Appeals for the Fourth Circuit should be reversed.

1. There is no principled basis to distinguish this case from Edwards v. Arizona or Arizona v. Roberson.

Respondent attempts in its brief in opposition to distinguish petitioner's case from Roberson, supra, and Edwards v. Arizona, 451 U.S. 477 (1981), on two basic grounds. First, respondent asserts that because petitioner saw his attorney after he invoked the right to counsel, the police were free to resume interrogation. Brief in Opposition at 11. Second, respondent asserts that because petitioner did not request counsel in the context of a police interrogation, he did not invoke his Fifth Amendment right to counsel. Brief in Opposition at 10. Before discussing respondent's arguments in more detail, it is important

to note that the panel of the United States Court of Appeals for the Fourth Circuit has already rejected respondent's contentions concluding, "[a]s an initial matter, we reject respondent's assertions to distinguish Roberson factually." Butler v. Aiken, No. 87-4004 (4th Cir. Dec. 12, 1988) Order at 2, modifying on panel rehearing Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988).[1] The Court of Appeals decision in this regard is compelled by an application of this Court's prior decisions to the facts of petitioner's case.

Respondent's second argument is wholly frivolous and will be disposed of first. The panel on rehearing found that:

> the appearance of counsel with Butler at a bond hearing on the assault charge for which he was first arrested conclusively demonstrated invocation of Butler's fifth amendment rights. The subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the Edwards rule as modified in Roberson.

Order at 2-3.[2] Nevertheless, respondent asserts that because petitioner did not invoke the right to counsel during a custodial interrogation, he did not invoke his Fifth Amendment right to counsel. This contention is rebutted by an unbroken line of this Court's prior decisions which hold that courts should give a

[1]The panel of the Court of Appeals, with five judges dissenting from the denial of rehearing en banc, held that although it would be compelled to reverse petitioner's conviction and sentence of death in light of Roberson if petitioner's case were before it on direct review, relief should be denied because Roberson did not apply retroactively to petitioner's case. Order at 3-4.

[2]The facts surrounding this claim are as follows. Petitioner was arrested on August 30, 1980, on a charge--later dismissed--unrelated to this offense. The officers brought petitioner to the county jail, where he remained until his bond hearing late the following evening. Prior to the hearing, petitioner invoked his right to counsel by retaining a local attorney, W. McAlister Hill. Hill appeared with petitioner at the bond hearing on August 31. Petitioner was unable to post bond and was returned to the Charleston County Jail. Hill later testified that he warned the police against any further questioning of his client. After attorney Hill left the jail, at approximately 12:15 a.m. on September 1, the same four officers who had arrested petitioner on the assault charge brought him to the Charleston County Police Headquarters where they initiated an interrogation concerning the murder of Miss Lane. After informing petitioner that they were charging him with the Lane murder, the police officers questioned him for some five hours, during which time they obtained two separate Miranda waiver forms and two different statements regarding his participation in the crime.

broad rather than a narrow interpretation to a defendant's request for counsel. See, e.g., Michigan v. Jackson, 475 U.S. 625, 633 (1986). As this Court stated in Jackson, "[w]hen an accused requests an attorney. . . he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel." 475 U.S. at 633 n. 7; see also Connecticut v. Barrett, 479 U.S. 523 (1987); Maine v. Moulton, 474 U.S. 159 (1985); Brewer v. Williams, 430 U.S. 387, 404 (1977) (defendant's actions in securing counsel revealed that he desired the presence of counsel before any police interrogation took place); Boles v. Foltz, 816 F.2d 1132 (6th Cir. 1987) (Defendant's request for counsel at arraignment is invocation of the right to have counsel present at any subsequent police initiated interrogation). Respondent, in essence, attempts to penalize petitioner for invoking his right to counsel at the earliest possible opportunity, i.e., immediately after his arrest on the unrelated assault charge. Thus according to respondent's perverse logic, the only way in which petitioner could have successfully invoked his Fifth Amendment right to counsel would have been--despite the fact that he had previously retained counsel to represent him--to submit to a police interrogation and then reinvoke the right to counsel during the custodial questioning. This, of course, makes no sense. Petitioner's actions in securing attorney Hill to represent him on the assault charge--and his appearance with Hill at the bond hearing prior to the police initiated interrogation--speak louder than words, and clearly demonstrate petitioner's assertion of his right to counsel.[3]

Second, respondent asserts that because Hill saw petitioner between the invocation of the right to counsel and the interrogation, that the mandate of Edwards and Roberson was

[3]It is important to remember when reviewing this claim that petitioner has a mental age between seven and eleven, and an I.Q. in the high sixties or low seventies. When he completed his education at the age of sixteen, he had only completed the fourth grade.

satisfied. Brief in Opposition at 11-12. Apparently respondent believes that once an accused invokes the right to counsel, the police are free to initiate interrogation after the accused has spoken with his attorney. Again this contention is soundly rejected by the clear language and logic of this Court's prior rulings. In Smith v. Illinois, 469 U.S. 91, 95 (1984) this Court held that "if the accused invokes the right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." See also Connecticut v. Barrett, 479 U.S. at 527-28 (once defendant invokes right to counsel then police are forbidden from engaging in further interrogation that is not initiated by the defendant; the purpose of this rule is to "erect an auxiliary barrier against police initiated interrogation"); Michigan v. Jackson, 479 U.S. at 633 (defendant's request for counsel at arraignment carries over to any subsequent police initiated interrogation).

Respondent's interpretation of Edwards and Roberson would undermine the "bright line" quality of the Edwards rule by permitting the police to reinitiate interrogation of a defendant following every meeting with his lawyer. A defendant would have to consistently submit to police interrogation and reassert his right to counsel after every attorney-client consultation. This reasoning is totally at odds with the rationale underlying this basic constitutional principle, which is that when an accused invokes the right to counsel he is expressing his view that he is not competent to deal with the authorities without legal advice. Michigan v. Mosely, 423 U.S. 96, 110 n.2 (1976); see also Michigan v. Jackson, 476 U.S. at 633-34, n.7. As this Court stated in Mosely:

> The reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney.

Mosely, 423 U.S. at 110 (emphasis added). Thus there can be no serious dispute that once an accused invokes the right to counsel, the police cannot initiate interrogation of the defendant himself. The police may contact his attorney and request permission to talk with the accused, or they may talk with the accused if he initiates the interrogation. However, they may not force an accused who has previously invoked the right to counsel to undergo questioning after every meeting with his attorney. Respondent's assertions to the contrary are erroneous.

2. Arizona v. Roberson is not new law.

Respondent, relying on this Court's recent decision in Teague v. Lane, ___U.S.___, 109 S.Ct. 1060 (1989), asserts that Roberson should not be applied retroactively to petitioner's case because Roberson is new law. Brief in Opposition at 12-16.[4] Again this contention is totally without merit. In Teague, a majority of this Court concluded that "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." 109 S.Ct. at 1070. Even a cursory review of Arizona v. Roberson reveals that it is not new law, but rather a straightforward application of this Court's prior decision in Edwards v. Arizona, supra. For example, in Roberson the majority framed the question presented as whether the Court should "craft an exception to [the rule of Edwards v. Arizona] for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation." 108 S.Ct. at 2096. The majority ultimately concluded that "[p]etitioner's attempts at distinguishing the factual setting here from that in Edwards are . . . unavailing," and affirmed the judgment of the Arizona Court

[4]In Teague, the plurality held that, in general, new rules of law should not be applied retroactively to cases in federal habeas corpus, and that retroactivity should be treated as a threshold matter in collateral proceedings.

of Appeals. 108 S.Ct. at 2100-01.[5]

Under these circumstances, the question before this Court is whether the bright-line rule of Edwards v. Arizona applies retroactively to petitioner's case. Edwards was decided while petitioner's case was pending on direct appeal to the South Carolina Supreme Court. Thus the retroactivity question presented in this case has already been resolved. In Shea v. Louisiana, 470 U.S. 51 (1985), this Court specifically held that Edwards applied to cases pending on direct review at the time it was decided. 470 U.S. at 59; see also Griffith v. Kentucky, 479 U.S. at 328 ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases sate or federal, pending on direct review or not yet final"); Yates v. Aiken, ___U.S.___, 108 S.Ct. 534, 537 (1988) (acknowledging that new rules apply retroactively to cases pending on direct review at time rule was established). This principle was not disturbed by Teague. The Teague plurality and concurring opinions agreed that an individual is entitled to the benefit of any decision rendered--whether the decision creates a new rule of law or not--before his or her conviction becomes final on direct review. 109 S.Ct. at 1075. Thus, as Edwards was decided on May 18, 1981, and the South Carolina Supreme Court did not issue its opinion in petitioner's case until February 22, 1982, Shea permits no other conclusion except that the "bright-line" rule of Edwards was applicable in petitioner's case. The Court of Appeals was incorrect in ruling otherwise, and its decision cannot be permitted to stand. See Shea, supra.

[5]Despite respondent's contention to the contrary, the Fourth Circuit panel on rehearing also did not believe that Roberson was new law as it found that "[t]he subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the Edwards rule as modified in Roberson." The panel also discussed the "Edwards-Roberson limitations on police interrogation". Order at 8. The panel on rehearing determined that Edwards and Roberson did not apply to petitioner's case because neither case had been decided at the time of petitioner's arrest and trial. Order at 3. This conclusion is at odds with this Court's decisions in Griffith v. Kentucky, 479 U.S.314 (1987) and Teague v. Lane, supra. The five judges dissenting from the denial of rehearing en banc also stated that this Court's holding in Roberson was nothing more than an application of Edwards. Order at 8-9.

CONCLUSION

Because the decision of the Court of Appeals conflicts both with the decisions of this Court and the decisions of other federal courts of appeal, certiorari should be granted in this case and the decision of the Fourth Circuit should be reversed.

Respectfully submitted,

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April 11, 1989

(5)

No. 88-6677

Supreme Court, U.S.
FILED
JUN 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HORACE BUTLER,

Petitioner,

v.

KENNETH D. McKELLAR, WARDEN, and the ATTORNEY GENERAL OF SOUTH CAROLINA, T. TRAVIS MEDLOCK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR CERTIORARI FILED FEBRUARY 24, 1989
CERTIORARI GRANTED MAY 1, 1989

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CHRONOLOGY OF RELEVANT EVENTS

DATE	PROCEEDINGS
August 30, 1980	Petitioner arrested on charge of assault and battery and placed in the Charleston County Jail.
August 31, 1980	Petitioner retains attorney William McAlister Hill and Hill appears at bond hearing that night with petitioner.
September 1, 1980	Petitioner questioned regarding murder of Pamela Lane and statement obtained.
January 24, 1981	Petitioner convicted of murder.
January 26, 1981	Petitioner sentenced to death.
May 18, 1981	*Edwards v. Arizona*, 451 U.S. 477 (1981), decided by this Court.
February 22, 1982	Conviction and sentence of death affirmed by South Carolina Supreme Court, *State v. Butler*, 277 S.C. 452, 290 S.E.2d 1 (1982).
October 12, 1982	Certiorari denied, *Butler v. South Carolina*, 459 U.S. 932 (1983).
October 15, 1982	Petitioner files application for post-conviction relief in the Charleston County Court of Common Pleas.
January 28, 1984	Post-conviction relief denied by order of Hon. Richard E. Fields, Resident Judge, Ninth Judicial Circuit.
August 27, 1985	South Carolina Supreme Court denies post-conviction relief. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 869 (1986).
January 26, 1986	United States Supreme Court denies certiorari, *Butler v. South Carolina*, —— U.S. ——, 106 S.Ct. 869.

DATE	PROCEEDINGS
May 2, 1986	Petition for writ of habeas corpus filed in United States District Court for District of South Carolina.
June 9, 1987	District Court denies habeas corpus relief, *Butler v. Aiken,* C.A. No. 86-1093-3 (D.S.C. 1987).
May 6, 1988	United States Court of Appeals for the Fourth Circuit affirms denial of habeas corpus relief. *Butler v. Aiken,* 846 F.2d 255 (4th Cir. 1988).
June 15, 1988	Court of Appeals denies rehearing.
June 15, 1988	*Arizona v. Roberson,* —— U.S. ——, 108 S.Ct. 2093 (1988), decided by this Court.
July 8, 1988	Court of Appeals requests parties to brief the effect of *Arizona v. Roberson* on it prior decision.
December 2, 1988	Court of Appeals enters its order denying petition for rehearing and petition for rehearing *en banc. Butler v. Aiken,* 864 F.2d 24 (4th Cir. 1988).

THE COURT OF COMMON PLEAS
FOR CHARLESTON COUNTY, SOUTH CAROLINA

HORACE BUTLER

v.

SOUTH CAROLINA, *et al.*

EXCERPTS FROM SUPPRESSION HEARING CONDUCTED AT PETITIONER'S TRIAL

* * * *

[40] EUGENE FRASIER

Being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Schmutz) State your full name, please.

A. Eugene Frasier.

Q. Sgt. Frasier, what is your employment?

A. I work with the Charleston County Police Department. I am a detective sergeant, presently assigned to more serious crime like homicide, robbery and burglary.

Q. How long have you been with the Charleston County Police Department?

A. Fifteen years and three months, ten and a half years as a detective.

Q. Sgt. Frasier, were you involved in the case of the Horace Butler case?

A. Yes, I was.

Q. Did you have an occasion to talk with Mr. Butler in the morning hours of September 1st of 1980?

A. Yes, sir, I did.

[41] Q. Would you tell us about that, please?

A. Yes, sir. Horace Butler was presently in Charleston County jail, at that time charged with assault and battery with intent to kill in reference to another case. I instructed Detective Simpson—

Q. Let me ask you this. How long had he been in jail?

A. He was arrested on the 31st of the month and this would have been some hours later.

Q. So he was arrested on the 31st of August?

A. Yes, sir.

Q. And this is September 1st?

A. Yes, sir.

Q. Continue on.

A. I had instructed Detective Simpson somewhere around approximately 12 or 12:30 to proceed to the Charleston County jail and pick up Horace Butler and bring him back to the Charleston County Police Detective headquarters. My instructions to Detective Simpson was pick Horace Butler up. If he voluntarily want to come and bring him to the county police station. Do not talk to him, but if he insists on what he is being brought for, advise him that he was being charged with murder and kidnapping and bring him to the county police headquarters.

Q. All right. Continue on.

A. At approximately 12:50 A.M., I walked in the detective office and Detective Simpson was already sitting down with Horace Butler. [42] I sat down and the first thing I said to Horace Butler, "How are you doing?" And he said, "Okay." I said, "You know why you were brought here?" And he said—he used this signal and said some where or somewhat. And I proceeded to tell him why he was brought, that I was investigating the killing and murder, kidnapping of Pamela Lane, the little white girl down in the country, and that his name had come up as a suspect in it and I said,

"Right now we are charging you with murder and kidnapping. Do you understand that?"

Q. Murder and kidnapping?

A. Murder and kidnapping.

Q. Continue on.

A. I asked him at that point, I stopped and asked him, "Are you sleepy?" And he said, "N!, sir." He have a habit of using this motion and at one point I said, "I can't understand you when you do like this. You will have to tell me," and he said, "No, sir." I said, "Since you have been in the Charleston County jail have you taken any medication or anything?" And he said, "No, sir." "From a doctor or anything?" And he said, "No, sir." At that point I told him this. I says, looking at Horace Butler, I asked him, and I already know from a future time that he had had a seventh grade education, so—

Q. You asked him? How did you know he had a seventh grade education?

A. We had taken a statement from him, Detective Simpson and [43] Detective Greer on the night he was arrested in reference to an ABWIK case, assault and battery with intent to kill.

Q. You say you had taken a statement from him on the 30th or 31st of August?

A. Yes, sir, verbally I was present and give him his Miranda warning when Detective Simpson and Detective Greer wrote the actual statement out in my presence and signed it.

Q. All right. He had received his Miranda warnings before then?

A. Yes, sir.

Q. On an unrelated charge?

A. Yes, sir.

Q. All right. Continue on.

A. Knowing what Horace Butler told me, I asked him again what his education standard was and he said

seventh grade and I told him before he make any statement or say anything to deny or admit anything about the Pamela Lane killing, that I am accusing him of, that he have certain constitutional rights.

Q. Where were you all now when you told him this?

A. In the detective office upstairs, county police headquarters where the normal routine detective work takes place.

Q. Were you in the interrogation room then or were you in the outside area?

A. I was in the interrogation room.

Q. Go ahead.

A. I explained the cause that he had certain constitutional [44] rights and with a seventh grade education, when I give Miranda warnings, it depend on the type of people I am dealing with, vocabulary and educationwise, I usually try to go to the level with that person, although I had no reason to believe that Horace Butler wasn't educated enough to understand. I said, "This is what I want you to understand, before you say anything to me. The law says this. It is called your constitutional rights, but I am going to tell you the way you can understand it. The laws says you have certain rights and those rights are this. That since I am charging you with the killing of Pamela Lane, you have the right not to make any statement against yourself if either one of these detectives or myself asks you questions about Pamela Lane." And I asked him, "Do you understand that?" And he said, "Yes, sir." I said, "Although, if you refuse and don't want to talk to me, that fact can't be brought up and used against you saying that you didn't talk to me. In other words, I can't tell the jury and judge something bad about you because of the fact that you wouldn't talk to me. Do you understand that?" He said, "Yes, sir." I said, "Understanding that, you also understand that if you do decide to talk to me or tell me anything about the killing of Pamela Lane and this murder, do you understand that I can then turn

around and tell a judge and jury what you said and turn it around and use it against you?" And he said, "Yes, sir." "Or even if you bring up facts that help you, I can tell a jury [45] and a judge that." I said, "Do you understand that?" He said, "Yes, sir." I said, "Based on those facts, you, also, have other rights and those rights are this, that you have a right to have a lawyer. If you can't afford a lawyer, in other words, if you can't go on and get yourself a lawyer or your family can't get a lawyer because you don't have any money, the judge, the State of South Carolina will have to appoint you a lawyer free of charge before you can be tried in court. Do you understand that?" At that point Horace said, "Yes, sir, Mr. Frazier, but I don't need no lawyer because I tell you I didn't do the killing." At that point I stopped him again, I says, "Wait a minute. You will get your chance to talk. I want you to understand your rights," and he says, "Okay." I also told Butler, after he said he understood this, I said, "Further, you have a right to have a lawyer here now. In other words, "if you tell me, 'Mr. Frasier, yes, I want a lawyer,' after I told him he have a right to have one present while we interview him, I says, do you want one now?" And he said, "Mr. Frasier, I know about the lawyer, but I don't need a lawyer because I didn't did the actual killing." That is the words he used. From that point I said, "Do you understand all the right I give you?" And he says, "Yes, sir." And then he says, "Well," I says, "You are telling me now that you have no knowledge about the Pamela Lane Murder?" And he said, "Mr. Frasier, I didn't say that I didn't have no knowledge. I said I didn't [46] did the actual killing." That was his reply. And I said, "There is no doubt about you understand your rights?" And he said, "Yes, sir," he understood his rights. And then I told him after he said that, I said, "Well, go ahead and tell me what your knowledge about the Pamela Lane murder," and he hees and haws in the chair like, well, I don't want

to get nobody in trouble. Said, "Mr. Frasier, it is kind of hard," using this type of thing. I said, "Well, you said you didn't do the actual killing, but you never deny that you had no knowledge because you were insisting on talking to me while I was giving you your rights." I said, "What knowledge do you have?" And he continued and said, "Well, you know when two men are friends, that it is kind of hard to say something or talk." I said, "Butler, it will probably be incumbent upon you—" I used the word incumbent and I told him what that meant. I said, "It is probably on your behalf, since you understood your rights, to say what your knowledge of it is." And at that point Butler says, "Okay, I'll tell you what I know." And this is when he went through the first statement verbally with me telling me verbally that he was at the Whiz Club and that he had loaned Larry White his car and went through the whole chain of events of statement. After he had given the statement verbally to me—

Q. You are not writing it down?

A. No, sir. I am listening for chain of events verbally.

[47] Q. Who else was there?

A. Detective Simpson was sitting there at the desk. The door is open, office door is open. By this time is there Capt. Stutts, another police officer. At that point I said, after he had finished giving the statement verbally, I then asked him, I said, "Would you, after telling me verbally, you have already told me what happened, would you give Detective Simpson a written statement and sign it saying that you tell me this of your own free will?" And he says, "yes, sir." At that time I instructed Detective Simpson to change place with him in front of him and I got to the right, the next chair, and Simpson then proceed to put the form down and start taking the statement verbally. I mean verbally by sentence, every time Butler said I did this, he would write this sentence out and ask him what next.

Q. All right. Were there any more warnings given?

A. At that point after Detective Simpson wrote the statement out with he saying he understood his right, I discover on that very first statement that instead of putting the statement form on the Miranda itself, Detective Simpson did not. I then ordered—not ordered, but instructed him that I wanted him to use the form that we always use with the Miranda warning and have him write the time element and initial it saying he was warned of his rights. At that time Detective Simpson pick up the actual form that we use. We have got a witness form and [48] one with a defendant form. Detective Simpson picked that form up and then read Butler his Miranda warning off the form, although I had give it to him, read it and told him that is the same thing that Sgt. Frasier had just told you earlier, but I am going to read it to you and again if you have seen a Miranda warning, the way he had a seventh grade education there.

Q. He read that out in your presence?

A. He read that out in my presence right there.

Q. Quickly read those out.

A. This is the warning that he read. He said this statement of Horace Butler is taken before Detective John Simpson of the Charleston County Police Department. Date 9-1-80; time—this is the second statement or the first one, 2:55 A.M. I, Horace Butler, whose address is Post Office Box 199, Adams Run, S.C., am 24 years of age and have complete the 7th grade in school. Detective John Simpson, Jr., who had advised me that he is a member of the Charleston County Police Department, has advised me, number one, that I have an absolute right to remain silent and do not have to answer any question or give any statement as to the facts cannot be used against me. 2, that if I do answer questions or give any statement, anything I say can and will be used against me in a court of law. 3, that I have the right to consult with a lawyer of my choice before I

answer any question or give any statement and, also, have him present while I am being questioned. 4, that if I [49] wish to talk to a lawyer or have him present, but am unable to afford or hire a lawyer, one will be appointed for me free of charge. 5, that if I do decide to answer any question or give a statement without having a lawyer present to represent me, I have the absolute right during this interview to stop answering any questions and remain silent.

Q. All right. Sgt. Frasier, were you right there when he read those out?

A. Yes, sir. I didn't finish yet.

Q. All right, go ahead.

A. I fully understand each of these rights which have been explained, to me and having these in mind, I wish to waive those rights and answer any questions concerning the charge of murder and kidnapping which I have been accused of committing. No threat, force or promise of any kind have been made to me by anyone to induce or cause me to have waive these rights and answer questions. Signed: Horace Butler; witness, John Simpson, Jr., Detective S. B. Greer, Detective Sgt. Frasier.

Q. So you are telling me you were right there when those were read to him?

A. Yes, sir.

Q. Did he appear to you to understand them?

A. Yes, sir.

Q. Did he give you a statement?

A. Yes, sir.

[50] Q. Did he give you a statement?

A. Yes, sir.

Q. Read out the statement.

A. This is the first verbal statement that he give that we reduced later on on the Miranda form, that I just told you.

Q. I realize that. _____

A. The statement started off with "On Thursday, July 17, 1980, I pick up Larry White at his residence on

Clyburn Road in Adam Run. This was about 11:30 or 12 o'clock in the morning. He got into my 1972 Plymouth and went to Bobby Deas house to work on a car. Bobby Dead live only a short distance from Larry White. We work on the car until about 5:30 P.M. Bobby Deas did not have any money to pay us for the work, so he give us an old Dodge car for payment. We towed the old Dodge behind my 1972 Plymouth. I drove my car and Larry White and Eric Johnson were in the old Dodge. After we got the old Dodge to my house I took Larry White and Eric Johnson home. Then I drove and went home and washed up. After I got cleaned up I drove my car down to the pool hall on highway 174 near highway 162. I had agreed to meet Larry White there. We shot a couple games of pool and then decided to go for a ride. We drove around for a couple of hours and then returned to my house. Larry stayed at my house for about an hour and then asked me if he could borrow my car for a short while because he said he had some place to go. I did not plan to go anywhere, so I lent [51] my 1972 Plymouth to Larry. After Larry left I stayed around my house. Larry was gone for a couple of hours before he returned to my house. I asked Larry why he had been gone so long and he asked me to go outside with him so that he could talk. We walk outside and Larry told me he had hit a girl on a Moped on the old Sap Road highway 164 between highway 162 and 174. I asked him if he had called the police and he stated that he had not because he was scared. I asked him why he was scared and he told me that he was afraid that the girl that he had hit wasn't going to live. I asked him where was the girl at and he stated that he had taken her to Pineland Road, shot her and threw her into the vault. I was going to call the police. I didn't because Larry begged me not to. I then drove Larry down to the pool hall, drop him off. I then drove in my car down to Hector Grant Club in Parker's Ferry but did not stop because it was closed when I got there. I then drove

back to the pool hall where I had dropped Larry off and looked for him. I could not find Larry at the pool hall, but I was able to find him at the Whisk Disco Club next to the pool hall. Larry told me he had forgotten to tell me something and told me that he needed a favor. Larry then told me that after he had hit the girl on the Moped that he had touched the Moped and was afraid his fingerprint was on the Moped. Larry asked me if I would help him move the Moped from the Sapp Road. Larry stated if anything came up, he would take the blame. I let Larry drive my car, since [52] he knew where we were going. We found the Moped on Sapp Road load it into the trunk of my car. Larry then drove down Sapp Road, highway 162, cross over highway 174 and continue down Sapp Road for about one mile and turned left into a dirt road. At the end of the dirt road was a small pond and we unloaded the Moped and push it into the pond. Larry then drove my car to his house on Clyburn Road and got out. I drove myself home and stayed there for the rest of the night. About a week later Larry White, Leroy and myself went to New York to pick Larry's and Leroy's little sister. I went along to help with the driving. We were gone for about one week and then returned. While in New York we stayed with Larry and Leroy's older sister. I do not recall her name. We did, however, told her about the incident concerning the girl and the Moped.

I have read—I have had read, read to me the foregoing statement which has been freely and voluntarily made by me and it was true and correct to the best of my knowledge.

Signed: Horace Butler. Witness: John Simpson, Detective W. B. Greer and Detective Sgt. Frasier.

Q. All three of you witnessed that signing?

A. Yes, sir.

Q. What time was that statement given to you?

A. That first statement?

Q. That statement is the one I am talking about.

A. This statement was begun at 2:55. The actual reduced to [53] writing begin at 2:55 A.M., after taking the first one.

Q. And then what happened next?

A. After Butler had given the statement, this first statement, which is two copies, I told Butler I don't necessarily believe his story. He said, "Why, Mr. Frasier?" I says, "According to my investigation with reference to all the circumstances and facts that we gathered and what I know of this case in my intensive investigation," I said, "I believe you are lying. I don't believe you are telling the complete truth." And he looked at me and said, "Well, why do you think I am lying?" I says, "Well, let me put it this way. I have been a detective for quite some time and your story is just too much inconsistent from what I know from the facts." He said, "I don't know what else I could tell." I said, "You could tell the complete truth." I told Horace at that time, I said, "Not only that. I am going to be honest with you. We have talked to Larry White and he has given a statement and I know the whole facts in the case." I did not go into anything what Larry White told me, but I said I know the whole complete truth and you might as well come on out with it.

Q. Were you alone with him?

A. No, sir. It was a point I made in that investigation that no one detective would sit with Horace Butler for a couple of reasons that I have already experienced before in my investigation. Any time one detective leave the room, either Detective [54] Greer would sit with Simpson or Simpson would sit with Greer or I would sit I would sit with Simpson.

Q. All right. Go ahead.

A. After I told Butler that Larry White had done told me the whole story, he might as well come out with it, he then tell me, "Okay, Mr. Frasier." He didn't call me sergeant, but he said, "Mr. Frasier, I will tell you

what I know. And then he proceed, after I told him about Larry White told us the whole story, he proceed with the second statement which will be the third written statement, which would be the second statement.

Q. All right. Were any more warnings ever given to him?

A. Yes, sir. Then I went through the same procedure as I did before.

Q. Let me interrupt you. Was he continuously sitting down or did he ever ask to go to the bath room?

A. Yes, sir. Between the first statement and the second statement Horace Butler had used the bath room and the water fountain twice, that second statement, Capt. Stutts had went and got a coffee break. We took a coffee break, thirty minutes coffee break, which nobody is being questioned or talked to. Capt. Stutts returned, we give Horace Butler cup of coffee, couple of doughnuts and all the other police officers and they sat down and drink coffee and doughnuts and then it was resumed at 2:55.

Q. Where was this? Was this in the interrogation room?

[55] A. No, sir. The door of the interrogation room was open. By that time there we had Capt. Stutts in the main office, main detective office, we had officer Cochrane in the main office, we had Detective Greer, Detective Simpson and myself all sitting down. The door was open in the interrogation room until Capt. Stutts returned.

Q. All right. You say Capt. Stutts is the one that went and got the coffee and doughnuts?

A. Yes, sir. Capt. Stutts is the captain in charge of the whole west district station of the county police.

Q. Where did he go to get them?

A. Doughnut shop.

Q. It wasn't right there?

A. No, sir. He has to go down to Rivers Avenue.

Q. What did you all do while he went to do that?

A. Sat there and chat.

Q. Any question about this?

A. No, sir, when we take a coffee break we take a coffee break.

Q. Continue on.

A. After Capt. Stutts had returned the second time with the coffee and everything, this statement was then taken. At this time Detective Greer has now changed places, sitting there now with this final second statement.

Q. Are you there?

A. Yes, sir, I am sitting there. I am always there for the [56] for both of the initial statement and the verbal warning.

Q. All right. Go ahead.

A. Detective Greer then, after I turned Butler over to him and I moved to the second seat, Detective Greer went through this form with Butler and it goes right back to the same Miranda warning that Detective Simpson had given. It goes like this. He told Butler this is a statement of Horace Butler and is taken before Detective W. Greer of the Charleston County Police Department. Date: 9-1-80, approximately 5:45 A.M. on the second reduced statement now, because we moved from the 2:55. Okay. I, Horace Butler, whose address is Post Office Box 199, Adams Run, 23 years of age, and have completed the 7th grade in school. Detective Greer, who has advised me that he is a member of the Charleston County Police Department, has advised me, one, that I have an absolute right to remain silent and do not have to answer any question or give any statement and this fact cannot be used against me. That if I do answer any question or give any statement, anything I say can and will be used against me in a court of law; that I have the right to consult with a lawyer of my choice before I answer any question or give any statement and also to have him present while I am being questioned. That if I wish to talk to a lawyer or have him present, but am unable to afford to hire one, one will be appointed to represent me free of charge. 5, that if I decide to answer questions

or give a statement without having a lawyer present, [57] representing me, I have the absolute right during the interview to stop answering questions and to remain silent. I fully understand each of these rights which have been explained to me and having these in mind, I wish to waive these rights and answer questions concerning the charge of murder and kidnapping which I have been accused of committing. No threat, force or promise of any kind have been made to me by anyone to induce me or to cause me to waive these rights and answer questions. Signed: Horace Butler; Witness: Detective W. B. Greer, Detective Sgt. Frasier.

Q. Did he appear to understand that, Sgt. Frasier?

A. Yes, sir, no doubt in my mind he did.

Q. All right. What did he tell you?

A. After Butler give the statement and he signed the Miranda warning, he went on verbally to tell me this. This is the second statement, he says, I have given. The first statement I did not tell the complete truth. On Thursday, 7-17-80, I was at Duffy's on highway 162. Duddy Club on highway 162 in Hollywood, S.C. About 12 o'clock I saw this white female ride by on a Moped. She was heading south toward highway 174. I had been drinking beer and smoking a reefer. I was walking out of the door of Duffy when I saw her. I left Duffy and drove to Peanuts on Baptist Hill Road. I stayed for a few minutes at Peanuts. I walk back outside and got into the car. I drove back on highway 162. I turned left on highway 162 and [58] headed toward highway 174. When I got to highway 162 and 164 by the E.M.S. station the white female was just passing E.M.S. station headed down highway 164. After she passed the house on highway 164 I blinked my light and she stopped. I pulled up beside her and we started talking. It was just general conversation. I asked her if she wanted to get a couple of beers and she said, no, I already had a couple of beers. I asked if she wanted to go for a ride and she says sure. She got off her Moped and pushed it up in

the bushes. She then got into my car, my beige 1973 Plymouth. I drove down to Hutton Plantation. I drove back up into the woods and parked. She asked me if I felt like doing anything. I said it depends on what you are talking about. She then started taking her clothes off. She took her shoes off first, then she took her pants off, and then she took her blouse off. I had sex with the white female. After we finished it was kind of late. She said she was going to cry rape. I asked her why she was going to cry rape. She said she was going to cry rape because she was late getting home. She had put her pants and smock top on. She had her blouse in her hand. She said again that she was going to cry rape, so I panicked and I had the gun in my hand. Before I realized what had happened I shot her. She fell to the ground. I pick her up, put her in the front seat, her shoes were in the front floor of my car and before I left the area I threw them out of the car. I left Hutton Plantation and [59] drove over to Pineland Road. I drove down Pineland Road to the bridge. I stop at the edge of the bridge. I took the white female out of my car and threw her out of the side of the bridge. I left Hutton Plantation Road and drove to the Whisk.

Q. Is that Hutton Plantation Road or Pineland Road?

A. Pineland Road. Excuse me. Pineland Road. I left Pineland Road and drove to the Whisk. When I arrived at the Whisk I saw Larry Dent standing outside. I asked him to go inside the Whisk Club and get Larry White for me. Dent went inside and a few minutes later Larry White came outside. I told him what had happened. He said, "Don't worry about it. I will help you out." We got into my car and drove down to 164 and pick up the Moped. Larry was driving at this time. He drove down 164 and cross highway 174 into the Sugar Hill section. He turned in behind the church. We took the Moped out of my car, put it in the pond. He told me not to think about it, that he would probably have done the same thing. Larry said he had already

killed someone in New York. I told him that I didn't mean to kill her. Larry drove the car to his house and when he got out of the car I got under the wheel and drove home. On Sunday, 7-20-80, about 12 or 1 o'clock I was on highway 174 in front of the fire tower. I was talking to James Ancrum. He lived next door to me. I give James Ancrum my .22 caliber pistol that I used to shoot the white female with and James [60] Ancrum give me $15.00. As far as I know, James still has the .22 caliber pistol.

I have read, had read to me the foregoing statement which has been freely and voluntarily made by me and it is true and correct to the best of my knowledge.

Signed: Horace Butler. Witness: W. B. Greer and Detective Sgt. Frasier.

Q. Okay. Detective Greer, you were there when both statements were given?

A. Yes, sir.

Q. Right there?

A. Yes, sir.

Q. Who wrote down the first statement?

A. Detective Simpson.

MR. HILL: Excuse me. That is Detective Frasier.

Q. I am sorry, Detective Frasier. Detective Frasier, you were there when both statements were given?

A. Yes, sir.

Q. Who wrote down the first statement?

A. Detective Simpson.

Q. This man sitting right here?

A. Yes, sir. At the time he was a detective and now he is a uniformed officer.

Q. All right. Were you there when the second statement was given?

[61] A. Yes, sir.

Q. Heard it all?

A. Yes, sir.

Q. Heard the warnings given?

A. Yes, sir.

Q. Who wrote down that statement?

A. The second statement, which would be the written statement, would be Detective Simpson, also. We have three complete statements.

Q. I am talking about the second statement that was given at 4:45 A.M.

A. Detective W. B. Greer.

Q. That man sitting right there?

A. Yes, sir.

Q. What happened next?

A. After this statement, the second statement was given, and Butler had signed it, I told him that I still had problem with his statement and Butler says, well, that is what happened. One of the reasons why I told Butler that I had problem with the statement was, number one, that there are certain things that I believe and certain things that personally from my investigation I believed because of the fact, this fact that there were only certain information released on this particular case. One—

Q. All right. I don't need you to get into that. I want to [62] know what you did next, if anything, after you took that statement.

A. All right, after we took the statement and I talked to Butler briefly I asked Butler if he was tired and he said no, sir. Because at this time we got another coffee break in there. Another coffee break with doughnuts, which was the third break of coffee and doughnuts.

Q. Coffee and doughnuts?

A. Yes, sir.

Q. This is the third time?

A. Yes, sir.

Q. Capt. Stutts go get them?

A. Yes, sir.

Q. Did you all talk about any of this?

A. No, sir.

Q. How long would you say those breaks lasted?

A. One break I have got the time element about 35 minutes, the other one about 25 and I believe the other one was about a half an hour.

Q. Did you ever ask him if he wanted to go to bed and continue this the next day?

A. That is about what I was going at now. After Butler had been there and it appeared that he was all right, I asked him, I says, "Since you claim that you are telling me the truth, do you mind taking us back to the scene and show us the area [63] that this happened or do you want to go back to jail and we could continue later?" Butler says, "I might as well get it over with now." At that point Capt. Stutts had went to get the, just walked out to get the coffee and he asked me if we take him out in that area what would be close to his home, could he stop by his house. I told him I didn't have the authority to take him by his residence because of the case, but I would consult with Capt. Stutts upon his return and going out there. However, I did not ask Capt Stutts right there when he returned from the coffee break. It had slipped my mind. But nevertheless, Butler did voluntarily ride in the car with us. He was riding with Detective Greer and myself.

Q. Before that did he ever ask you if he could talk to Larry White?

A. Yes, sir. When Butler realized that somehow one of the detectives mentioned that Larry White and Detective Greer was downstairs coming upstairs, he asked me is that Larry White downstairs, supposed to be downstairs and I said yes, Larry is down there. He said, "What is he doing?" I said, "He is under arrest. He is under arrest for murder and kidnapping, just like you." He said, "Could I talk to him a minute?" And, of course, I left the room and Detective Simpson took my place with Detective Greer and I walked down and asked Larry, I says, "Butler is asking to talk with you for a minute, "but I says, "I ain't no way gonna insist on your talking to Butler, [64] but if you want to confront

him and he want to confront you for a second, we will stand by." And Larry said, "Well, I will talk to him." So both of them commit—uh—want to talk to each other, I then escort Larry into the interrogation room with Butler while we are wait-ng with Capt. Stutts on the coffee break and they talked for a couple of minutes. I didn't hear all of what was said because it was only a minute and a half or two.

Q. Did you hear any of it?

A. I heard Larry aying something to Butler.

MR. HILL: Your Honor, I would have to object. I know that these things, maybe we can get into a certain amount of hearsay, but it seems to me we are getting far afield here now.

COURT: Well, the evidence is admissible because the conversation is with the defendant, but does it bear on the admissibility of this evidence?

MR. SCHMUTZ: Well, in effect it is another statement given by Horace Butler. It will be possibly a statement I will be trying to get in in front of the jury.

COURT: All right, sir. Go ahead.

MR. HILL: Your Honor, isn't a conversation allegedly between the defendant and a third party rather than the detective?

COURT: Yes, sir, but they are talking about him talking to somebody else and this officer present. It is admissible. [65] Go ahead.

A. Larry asked Horace, says, "I understand that you are trying to put this thing on me or blame the killing on me and you know you did it." And Horace says, "Well, I didn't say that you exactly, that you exactly did the killing." And Larry said, "Well, I don't see why you should say any other thing than the fact you know you killed the girl and come and told me after it happened."

Q. Let me ask you this. The statements that you heard Horace Butler say at that point, how much time

had elapsed between that point and the time that you had taken this second statement?

A. Between the first statement and the second statement?

Q. The second statement you had taken, how much time had elapsed between that and this inadvertent statement made out there with Larry White?

A. Right after we got—right after we got—I'd say within a minute or two minutes, because of the fact that Capt. Stutts had just walked out to get coffee and Butler overheard that we had Simpson downstairs. I would say between one and five minutes, to be on the safe side, five minutes, yes, sir.

Q. All right. Go ahead. Did you all go out to the scene?

A. Yes, sir.

Q. Tell us about that.

A. Horace Butler rode with myself and Detective Greer down to [66] Adams Run area. We all met Capt. Stutts at the Medicade station and there was some arrangement by Capt. Stutts and Detective Greer, which Detective Greer would testify this arrangement, that we called some people from the public works department out to search the area where the alleged rape took place.

Q. Is that where he took you, to where he told you the alleged rape had taken place?

A. Yes, sir.

Q. Did he take you anywhere else?

A. Yes, sir. After he took us there he took us from there I believe he at this time—I don't recall who he was with at this time, but from that point on I don't believe there was any place else he took us.

Q. What did you do after that?

A. Well, by this time time had passed because we were waiting for the people from the public works to help search the scene. But nevertheless, by this time I break away from Horace Butler and Detective Greer and Capt. Stutts. Then it should be close to right about

9 o'clock in the morning or 9:30 and I have to estimate that when the whole episode got through and he was returned back to jail I believe by Detective Simpson or I don't know which one returned him to jail, but should be close to 10 or 10:30 by this time.

Q. About 10 or 10:30?

[67] A. Yes, sir, estimated.

Q. All right. Detective Frasier, I am going to show you some pictures and ask you if you can identify them.

A. Yes, sir.

Q. What are they?

A. This is the first picture as you walk in the door, interior of the main detective office of county police headquarters in the North Charleston area.

Q. All right. What is that little room?

A. That is the interrogation room. You open this door and walk in. There is a room with three chairs, normal desk and everything else in there.

Q. Is that where the statements were taken?

A. Yes, sir.

Q. Were there people out here?

A. Yes, sir, basically during most of the time during interrogation Capt. Stutts, who is in charge of the station, would be sitting at this desk right here. Officer Cochrane would be sitting at the second desk and one detective would be floating around, walking around.

Q. All right. Are there telephones out there?

MR. HILL: Excuse me just one second. Could I ask for a brief recess for about two minutes? May I approach the bench?

COURT: Yes, sir. All right. We will be at ease for a few minutes.

[68] MR. HILL: I object to the introduction of those pictures.

COURT: On what grounds?

MR. HILL: On the grounds that that is not the proper way to authenticate demonstrative evidence. They are just putting in some pictures without the photog-

rapher who took them and they haven't authenticated them by any means whatsoever.

COURT: Doesn't this witness say he identifies them as photographs of the area in which this man was questioned?

MR. HILL: Yes, sir.

COURT: Do you take issue with his ability to authenticate them? He would kind of know what his detective squad room would look like.

MR. HILL: Yes, sir, he would know what it looks like, but he didn't take the pictures.

COURT: That is the ground of your objection?

MR. HILL: Yes, sir, and the relevancy of it.

COURT: Well, this is a hearing to determine the voluntariness of the alleged confessions of the defendant and the solicitor is entitled to put in anything that bears on that issue. I think a photograph of where an interrogation was taken is proper. I overrule the objection. Go ahead.

Q. Sgt. Frasier, I show you photographs marked State's Exhibits 1 through 4 and ask you if you can identify them.

A. Yes, sir.

Q. Is that the area that you have been talking about?

[69] A. Yes, sir.

Q. In your statements today?

A. Yes, sir.

Q. All right. Would you point out where the actual taking of the statement?

A. Yes, sir.

Q. Took place? That little room right there?

A. Yes, sir.

COURT: Which is your exhibit, solicitor?

MR. SCHMUTZ: On State's Exhibit #2.

A. Yes, sir.

Q. That appears there?

A. This is the interior of the main detective office and that is the room next to the desk.

Q. And I believe the interrogation room actually appears on all four exhibits, is that correct?

A. Yes, sir, that is correct, sir.

Q. When you were taking that statement were there people out there in that outer room in the detective room?

A. Yes, sir.

Q. Capt. Stutts one of them?

A. Yes, sir.

Q. Telephones on the desk?

A. Yes, sir.

Q. All right. Do those pictures fairly, accurately, depict [70] the scene as it occurred on August 31st?

A. Yes, sir, those desks, I was in the detective office yesterday and those desks are in the identical position now as it was on the night in question.

Q. Sgt. Frasier, I have just a few more questions of you. Let me ask you this, Detective Frasier. When Horace Butler was giving you these statements did his speech appear to be coherent?

A. Yes, sir.

Q. Did he respond when he was asked questions?

A. Yes, sir, no doubt in my mind that he did.

Q. Did you coerce him in any way?

A. No, sir.

Q. Did you strike him?

A. No, sir.

Q. Did you promise him anything?

A. No, sir.

Q. Did you intimidate him in any fashion?

A. No, sir.

Q. When he left your sight did he appear—how did he appear?

A. When he left my sight?

Q. Yes, sir, when he left your sight at about 9:30 or 10 o'clock the next morning.

A. He appeared—I imagine he could have been getting tired, but other than that he didn't complain. He was coherent, know what he was doing. He was intel-

ligent. Matter of fact, he still [71] asked me about could he go to visit his parents and everything and Capt. Stutts did refuse him that.

Q. Did he have any marks or bruises on him?

A. No, sir, none.

Q. I don't have any other questions of you. Answer any questions Mr. Hill has.

CROSS EXAMINATION

Q. (By Mr. Hill) Detective Sgt. Frasier, did you tell His Honor that Horace Butler was arrested for assault with intent to kill on August 31st?

A. I can refer back to the date.

Q. Well, that is what you told the judge a while ago, wasn't it?

A. Yes, sir.

Q. August 31st.

A. I testified he was in jail on the night of August 31st or morning of 9-1.

Q. No, sir. Didn't you tell the judge that he was arrested on August 31st?

A. If I told him that, counsellor, I was in error. Only thing I said is the date is eight one thirty eights and the morning of nine one eights. If I did that, it was partly incorrect. He was in the county jail. My statement I believe, he was in the county jail on 8-31-1980 and he was brought to the county police headquarters the morning of 9-1-80. That would be my [72] testimony, yes, sir.

Q. Who arrested Horace Butler for assault with intent to kill on August 30th, 1980, at the Corner Cupboard?

A. It was three of us, or four police officers converged on Horace Butler. It was myself, Detective W. Greer, Detective John Simpson and officer Cochrane.

Q. And that was Saturday night?

A. Yes, sir.

Q. Saturday night was August 30th?

A. Yes, sir.

Q. Then the man was in jail on August 31st, wasn't he?

A. Yes, sir.

Q. Now, you claim that Horace Butler gave you certain statements, don't you?

A. I don't claim that, sir. I know he did. It is a fact.

Q. All right. I hand you this document. Is that a copy of the statement, of the first statement?

A. Yes, sir. Yes, sir.

Q. All right, sir. How old does it say Horace Butler is?

A. 23 years old.

Q. And what grade of school did it say he completed?

A. 7th grade.

Q. And who were the witnesses to the first statement that Horace Butler made?

A. That was Detective John Simpson, Detective W. B. Greer, and [73] myself, Detective Sgt. Frasier.

Q. All right, sir. And did Horace Butler initial the Miranda warning?

A. He did, sir.

Q. Did he sign it?

A. Yes, sir.

Q. Did he sign page two?

A. Yes, sir.

Q. Did he sign page three?

A. Yes, sir.

Q. Now, at the bottom where it says I have received a copy of the above statement, did he sign that?

A. No, sir.

Q. Because he didn't receive a copy of it, did he?

A. We did not let him sign that part because the copy machine at the county police department was inoperative and we couldn't give him a copy. He was subsequently supplied by one, you and everyone at the preliminary hearing a copy.

Q. He signed a statement, you say, on September 1, 1980, which was a Monday?

A. 9-1-80, yes, sir, at 5:45 P.M.

Q. Three weeks later you give me a copy of each statement. That is on September 22nd, Monday at Judge Johnson's preliminary hearing, didn't you?

A. Copy from the original which I had in my possession, yes, sir.

[74] Q. Horace Butler never received a copy of this statement between September 1st and September 22nd, did he?

A. No, sir. He got a copy.

Q. All right. Have you ever been instructed that any statement given to public employees must be—When a statement is given to public employees the affiant or the person making the statement must be given an exact copy thereof?

A. That is our policy. That is why you see there is two parts there where you overlooked, sir. There is one part that says this that you overlooked and I must point it out to you. When he signed this statement it is a place on there that you have read and understand your rights and it goes on to say about furnishing a copy. In the second status you failed to read it says I have received a copy of the above statement and you will notice there is no signature there because we couldn't supply him with one at the time because the county copy machine was inoperative. For that reason he did not sign for one.

Q. He didn't sign for one because you didn't give him one?

A. I just touched on that, sir, and the reason why I couldn't give him one at the time.

Q. Now, did you tape record these statements?

A. No, sir.

Q. Did you video tape these statements?

A. No, sir.

[75] Q. When did you get in on this case?

A. Capt. Stutts called me 8-24-80 and told me he wanted me to take over this investigation of this mur-

der case and use whatever manpower necessary to bring it to a conclusion.

Q. What date?

A. 8-24-80.

Q. And you call one week an intensive investigation?

A. I would call one week intensive investigation to arrest a man for murder and kidnapping, sir, because I had to go through all of the other information and then subsequently bring this case to conclusion in police work.

Q. Who witnessed that first statement which was given at 2:55 A.M.?

A. Detective John J. Simpson, Jr., Detective W. B. Greer and Detective Sgt. Frasier.

Q. And who witnessed this second statemennt given at 5:45 A.M.?

A. Detective W. B. Greer, Detective Sgt. Frasier.

Q. Were you at a preliminary hearing in Adams Run held by Judge John Johnson?

A. I was.

Q. The hearing was September 22nd, wasn't it?

A. I don't recall. I would have to refer back to the date. But if that is when it was, I will agree to that particular time.

Q. You just stated under oath that you were not alone with Horace Butler at any time, didn't you?

[76] A. No, sir, I did not. I said at any time that one detective leave the room, another detective take their place. That is emphatically clear in this testimony. I said every time Detective W. B. Greer leave the room I would sit with Simpson or when Simpson leave the room he would sit with me.

Q. But Simpson's name doesn't even appear on the second statement, does it?

A. That have nothing to do with the facts, counsellor. I said every time one man leave the room another one—excuse me. Go ahead.

Q. It says Detective Greer and Frasier on the statement at 5:45 A.M., doesn't it?

A. It do.

Q. And you were at the preliminary examination?

A. Yes, sir, I was.

Q. Do you recall my asking Detective Greer: "Okay, Simpson, and Simpson knew and you all got him out and got this so-called confession from him, didn't you?" Do you recall my saying that?

A. Are you referring to Detective Greer, sir?

Q. Yes, sir.

A. Sir, it is possible you could have said that, because I was present, but let me clarify myself. You asked me a question. I can't say what terminology you used questioning Greer because I was there. I could refer to something you asked me directly. I would not say you didn't say that, sir, but I don't recall [77] that terminology. If you ask me a direct question of what you asked me, I could answer it, sir.

MR. SCHMUTZ: Your Honor, I am going to object. I don't think it is proper for him to get in through this witness what he asked Sgt. Greer on the stand.

COURT: Mr. Hill, this man is not responsible for testimony given by another witness. Go ahead and ask him the question.

Q. Le me get this next question.

COURT: All right.

Q. And I asked Detective Greer: "All right. Were you present with Detective Frasier at all times while the Detective Frasier was interrogating Horace Butler?" You were at the hearing. You heard Detective Greer say "No, sir," didn't you?

A. I would believe, to answer the question, counsellor, I would believe it was a possibility that he did answer that question like that, sir, because the fact that he wasn't—he would leave the room and take care of business and come back so I would assume that he would have said that. It is a possibility. Although I am not saying that.

Q. "Was Detective Frasier by himself when he was interrogating Horace Butler?" That is my question. Did you hear Greer say, "You will have to ask Detective Frasier that, sir."?

A. It is again a possibility he said that because of some detective moving out and another move in. I am not arguing that point.

[78] Q. Now, Detective Sgt. Frasier, when Detective Greer left that room that is when you roughed this man up, isn't it?

A. No one detective present—no one detective left with Horace Butler and the items anticipate, no one detective left with him alone at any point and I had my reasons for that, counsellor.

Q. Where were you when you took the first statement?

A. When the first statement was taken?

Q. Yes.

A. Verbally or written? Verbally or written statement?

Q. Verbally.

A. When he give us the verbal statement he sit down in front of me, I am facing him and he is facing me, Detective Simpson is sitting to my right and to his left.

Q. Where were you when the written statement was taken?

A. I was to the right and Simpson was took over in front of the defendant. In other words, I questioned him verbally, I changed desks with him or seat with him, since he do the reducing it to writing, and he has the pen and pencil there.

Q. Why didn't Simpson sign the second statement?

A. Why didn't Detective Simpson sign the second statement?

Q. Yes.

A. If I recall co-rectly, he did, sir.

Q. Would you like for me to show it to you again?

A. No, sir, I will take a look. I have got it right here.

[79] Q. You are mistaken about that, aren't you?

A. The reason I am referring to the second statement and first statement is because I testified from the beginning that the very first statement that was taken, which would be the same first statement, would actually be a first statement and a second statement. In other words, this statement was never typed, so I refer to the second statement which would actually be a first statement and a second statement. Sir, if you will refer back to your statement, you will see where Detective Simpson witnessed the statement at 2:55. That would be the second statement given to Detective Greer, would be the second statement or the first statement, whatever you call it, but this is the original first statement that wasn't typed up because he didn't sign the Miranda warning. There is no complication there.

Q. How about the 5:45 A.M. statement?

A. That is Detective W. B. Greer and myself.

Q. Simpson wasn't there?

A. Right. Simpson would not have been present in the room when this Miranda warning was given. Therefore, he would not have signed the statement because we wouldn't allow him to sign the statement if he was not there when this Miranda warning was given.

MR. HILL: Your Honor, I have to use some words I wouldn't normally use.

[80] COURT: That is all right. Go ahead.

Q. Detective Sgt. Frasier, didn't you tell this man, said, "You mother fucker, if you don't give us the information or you don't tell us or sign this statement, we are going to fry your ass?"

A. No, sir. Matter of fact, counsellor, I will add on to that, your client after being warned of his rights wanted to tell his side of the statement. No use for any intimidation on him.

Q. Didn't you tell him you would arrest his whole damn family?

A. No, sir.

Q. Which one of the officers told him that?

A. In my presence I never heard anybody abuse Butler. Instead of giving him three drinks of coffee and three sets of doughnuts and he laughed and talked with us.

Q. Didn't you call him a nigger?

A. No, sir. I would have got offended, probably, counsellor, if somebody had said that in front of me probably.

Q. Did you strike him with the heel of your hand?

A. No, sir. Was no need to. The man cooperate to a degree.

Q. The statement at 5:45 A.M. was given, immediately preceding that is when you were with him alone?

A. Counsellor, I keep stating that I was never alone with Butler at any time. I don't know how more clearly I can make it.

Q. Did you accept this statement, this last statement, as being [81] true in its entirety?

A. No, sir. I think I testified after he give the last statement I told him that I believed as an investigator with my experience, that there were certain things in there that were definitely true and I have reason to believe that the rest of them were either ad lib or made up. I told him I was satisfied there were things he knew about the murder that nobody else knew. I was satisfied that he had information that would put him, in my case, as a participant or either grounds for committing a crime.

Q. All right. You stated that—or he stated that he blinked his lights and the white girl stopped?

A. Yes, sir, he stated that. All right, sir.

Q. Did your investigation, your intensive investigation of one week lead you to believe or lead you to find anyone who could refute his statement?

A. No, sir.

Q. Well, why did you charge him with kidnapping?

A. Based on my investigation of fifteen years hard years as a cop, if you want to call me that, my experi-

ence, excuse the expression, my investigation would tend to indicate to me that a white female riding a Moped bike at 11 o'clock at night on a lonely highway and a black male flick the light at her, taking the entire situation in prospective, and telling me that she voluntarily tell a man that she would go with him, take off her [82] clothes, have sex with him, she make all the suggestions, everything, and then—

MR. SCHMUTZ: Your Honor, excuse me. I am going to object to this at this point. I think we are getting out of the field of what we are here for.

COURT: Right. Mr. Hill, I am going to try to allow you as much leeway as you think necessary in developing the question of is this statement voluntary, but why did you charge him with kidnapping would have nothing to do with whether the original statement was voluntary.

MR. HILL: Your Honor, I have four other motions dealing with this and unless I am required to go on every motion, I mean I have asked that the charge of kidnapping be dismissed because there is not one scintilla of evidence and also the same as to—

COURT: Mr. Hill, that would be proper after the state puts up its case, but I am not going to rule on whether particular crimes with which the defendant is charged should be dismissed during some en camera hearing. I have got to hear everything that the solicitor has and at the close of his case you can make the motion for directed verdict of not guilty because of lack of evidence, but I am not going to allow you to fish with this witness about the trial of the case. But this question, what we are hearing now is is this statement voluntary. Was he given his Miranda warning. And incidentally, [83] I am going to ask you, since you are suggesting that the prosecution here is somewhat ratially motivated, I am going to ask you not to ask witnesses questions which are going to necessarily result in an answer which would ordinarily not be admissible. I mean, you asked this witness why did he do something and he is required

to tell you and jumps the post black and white people and I am not going to have that during the trial of this case.

MR. HILL: All right, sir.

COURT: But you proceed in any way you wish to, Mr. Hill. But the question is was the statement voluntary.

Q. Who were the officers with you during that night, would you mind telling me?

A. Which night?

Q. The early morning hours.

A. Are you referring to the detective office when the statement and confession?

Q. Yes, sir.

A. It was myself, Detective W.B. Greer on the bench, Detective Simpson at the time, Capt. Stutts who is in charge of the entire west district police station, officer Cochrane of the uniform division and I believe there was possibility of another police officer in and out. I am not sure at this time that I know exactly who that was.

Q. Did you bother to check out—well—when you or Detective [84] Simpson or Detective Greer wrote the age of Horace Butler on there did you bother to check out his age?

A. No, sir. I asked him. I believe he and still do believe he is intelligent enough to know how old he is and when I asked him verbally how old he was he said he was 23. So I had no reason to call him a liar on his age, unless we double check it. We usually normally double check it, but most of the time a person doesn't lie about his age, at least a man doesn't. He was coherent and everything and I had no reason to believe he wasn't telling the truth at the time. However, there are times when we have other additional information on people in the computer that would indicate his true age.

Q. Now, after the statement that you made concerning Horace Butler's conversation with Larry White, were you eavesdropping outside the door?

A. I was standing right by the door.

Q. You were eavesdropping outside the door?

A. Yes, sir. No doubt about it. I have a right to be there because I didn't want no confrontation between the two of them.

Q. So any statements made in there, you didn't see them, you didn't see the words emanate from their lips?

A. I had visual observation of them, but I couldn't say exactly verbatim exactly what transpired one word to the other, just catching the general conversation.

Q. So what you are saying here today is taken out of context?

[85] A. No, sir, I don't believe it was taken out of context. I was standing right by the door.

Q. Didn't you say you couldn't pick up everything they were saying?

A. No, sir, I didn't hear every word verbatim, each word, but I can state what I overheard did clearly. You can stand up here in this room and if you are not paying direct attention from one party to the other one's mouth, you wouldn't necessarily catch what everyone say, but you certainly could pick up a conversation of this person and conversation with that person. I was standing less than three feet away.

Q. What you are saying is that Horace Butler had a conversation with Larry White?

A. Yes, sir.

Q. A private conversation, yet he spoke loudly enough for you to hear and you were only two to three feet away.

A. If you care to, counsellor, on one of these exhibits I will point out this is the main office, this is the door wide open. I was standing right there. Matter of fact, it wouldn't have been two or three feet away. It would have been less than that. It would have been as you open the door right there at the panel wall. I wouldn't say that I was in a position that I couldn't overhear. I was in position to hear.

Q. Were you in a position where you could see them?

A. Yes, sir.

[86] Q. Were they in a position where they could see you?

A. Horace Butler and both of them were looking at me out the door. I could observe both of them, but I am not going to sit here and tell you that I heard verbatim word for word what each one of them said to each other because I did not. My main purpose there was to make sure there was no confrontation between the two of them, since both asked to talk to each other.

Q. You stated that you went back to the "scene."

A. Yes, sir. Which scene now.

Q. The scene of the alleged kidnapping.

A. Yes, sir, I have been by that scene of the alleged kidnapping, yes, sir.

Q. Are you stating that that alleged kidnapping occurred on highway 164?

A. I am saying that?

Q. Yes, sir.

A. No, sir. Butler tell me that and he stop—

MR. SCHMUTZ: Objection again, Your Honor. It doesn't have anything to do with this statement. I think he is going on a fishing trip.

MR. HILL: I am not going on a fishing trip. He tried to make you believe that he went back, that Horace Butler took him to the scene and showed him everything. I have a right to cross-examine on what is brought out on direct.

COURT: Yes, sir, but not as to whether it is true or not, [87] but whether he voluntarily did these things. You are in effect examining this man as if the jury was sitting there waiting to pass on the credibility of his evidence. But the only thing I want to know is is the statement he made voluntary, not whether what he later said was true or not.

MR. HILL: Yes, sir, I realize that.

COURT: I am going to let you cross examine this man until you get tired of him when the jury is here. Now let's restrict it to whether the statement is voluntary.

Q. What time did you take Horace Butler back to jail?

A. I did not take Horace Butler back to jail, sir.

Q. Did you send Simpson over to the jail to get Horace Butler?

A. I did. That is prior to a confession.

Q. All right. Were you cognizant of the fact a bond hearing was held at the jail on August 31, 1980, at approximately 8:30 or 9 P.M. and the fact that I was there representing Horace Butler on assault with intent to kill?

A. When he was picked up for the charge of kidnapping and murder I assume that he had a bond hearing.

Q. No, sir, not when he was picked up for the kidnapping and murder. When he went to the jail to pick him up, is that what you are talking about?

A. You asked me if I knew that he had a lawyer at a bond hearing?

Q. Yes, sir.

[88] A. During the night in question, let me answer your question, you asked me--the night in question as of the confession, no, sir, I did not know. I later learned from Detective Simpson that you were his attorney later on and that he, in fact, had a bond hearing. I did not attend a bond hearing or handle it or know whether he had a bond hearing. I was concerned with murder and kidnapping. Detective Simpson would be the man you have to check with on that.

Q. Thank you, sir. I have no further questions.

COURT: All right, solicitor, do you have any?

RE-DIRECT EXAMINATION

Q. (By Mr. Schmutz) Why didn't you use a tape recorder or video tape?

A. Two reasons, sir. One of the main reasons the solicitor who just left office, Capers Barr, strongly suggested us, after having problem with video tape and tape recorder, unless it was absolutely necessary and the fact that there could be no interruption between those tapes, to refrain from using it and the fact at the time I was not prepared to use a tape recorder that would stop half way in the middle of testimony and crank it back up. We had the same problem here from my experience in General Sessions Court.

Q. You are telling me your general policy is not to use tape recorder?

A. MJ instructions from the former Ninth Circuit Solicitor, [89] yes, sir.

Q. Thank you.

RE-CROSS EXAMINATION

Q. (By Mr. Hill) Why wouldn't you consider it absolutely necessary? Why would you not consider it absolutely necessary for Horace Butler's statement to be recorded?

A. That could have been absolutely necessary, counsellor, but I put it this way to you. When I told you I was conducting an intensive investigation that day or that night, I had no idea that the evidence of that night at 1:30 would indicate that we had enough evidence and circumstantial case for probable arrest of Butler. Therefore, not knowing when Butler would be arrested, I had no reason two or three days to look for a recorder. My job was to conduct an investigation. If the tools and equipment was necessary when that became available, fine. If it wasn't, we resort to what we had to use to the best of our advantage.

Q. So what you are saying is until Sunday night late you didn't have what you considered enough information on which to arrest the man?

A. Excuse me, sir, would you repeat that counsellor?

Q. Until Sunday night, August 31, 1980, you did not have enough what you call circumstantial information upon which to arrest Horace Butler?

MR. SCHMUTZ: Objection again, Your Honor.

[90] COURT: Mr. Hill, that has nothing to do with whether the subsequent statement was voluntary. I mean if he just dreamed him up out of the clear blue sky. The question is was the statement voluntary.

MR. HILL: My question was in re-cross, as a result of questions asked on re-direct.

COURT: Yes, sir, but the question which he asked on re-direct was relative to your questions about whether it was video taped and he said it was the policy not to do it.

MR. HILL: All right, sir.

COURT: Now you are asking him what was the basis on which he arrested the man. Has nothing to do with this issue. Anything further, gentlemen?

MR. SCHMUTZ: Your Honor, that is the state's showing. If you wish to hear argument from me, I will.

COURT: Mrs. Wilson, I want you to because, and I am not speaking in any way derogatory of the defendant's counsel. He has got a job to do and he is doing it well, but he has suggested through numerous of his pleadings there is potential racial prejudice in this case. I want the record to show that Sgt. Frasier, who appears to me to be an outstanding police officer, is himself black and was in charge of this investigation and was in charge of the interrogation of this defendant. So put that in the record. Thank you, Sgt.

MR. HILL: Your Honor, the defense calls Mr. Frazier to [91] the stand.

ISIAH FRAZIER

Being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Hill) State your full name, please.
A. Isiah Frazier.
Q. Mr. Frazier, where do you live?
A. I live in the area of Washington Park.
Q Where is that?
A. That is in St. Andrews Parish.
Q. Is that in Charleston County?
A. It is.
Q. What is your age, Mr. Frazier?
A. I am 52.
Q. Are you married?
A. I am.
Q. Have children?
A. I have.
Q. All right, sir. What is you occupation, Mr. Frazier?

A. I am principal of Minnie Hughes Elementary School on Youngs Island, South Carolina.

Q. All right, sir. Now, for the benefit of His Honor, Youngs Island and Adams Run are contiguous territories, they join each other, don't they?

A. They do.

[92] Q. All right, sir. How long have you been the principal at Minnie Hughes Elementary School?

A. Since 1966.

Q. All right, sir. While you were a principal at the Minnie Hughes school did you have an occasion to have HORACE Butler as a pupil?

A. Yes, I did. Horace Butler entered Minnie Hughes Elementary School September 9, 1970.

Q. And September 9, 1970?

A. Yes, sir.

Q. All right, sir. What is Horace Butler's birth date? Do you have the records here today, sir?

A. Yes, I have. And I have recorded on Horace Butler's cumulative folder October 22, 1958.

Q. Okay, sir. How old was Horace Butler when he entered Minnie Hughes Elementary School?

A. He was almost twelve years old.

Q. When he entered the first grade?

A. That is correct.

Q. And what grade did Horace Butler complete?

A. As we have it recorded here, Horace Butler completed the fourth grade, at which time he was sixteen and he never returned.

Q. All right, sir. And how old was he?

A. How old was he? About sixteen when he stopped.

Q. He finished the fourth grade when he was sixteen years old?

[93] A. He completed the fourth grade.

Q. As an educator, do you feel that a fourth grader, a person with a fourth grade education, knows how to use words like smock and have a great vocabulary after the fourth grade?

A. Would you repeat that question?

Q. Yes, sir. Do you feel that a fourth grader has a good vocabulary normally?

A. Well, I would say the average student has a pretty good vocabulary in the fourth grade level.

Q. Your Honor, I have no further questions.

COURT: Thank you. The solicitor will have none.

MR. SCHMUTZ: Excuse me, Your Honor?

COURT: Do you have any questions?

MR. SCHMUTZ: The state will have a couple questions.

COURT: Go ahead.

CROSS EXAMINATION

Q. (By Mr. Schmutz) Mr. Frazier, to the best of your knowledge, can Horace Butler read and write?

A. Yes, sir, I believe he can.

Q. He can read and write?

A. Yes.

Q. What would you judge his intelligence level to be?

A. I would say less than average. I would say maybe about 90, 85 or 90, 95, somewhere around that range.

Q. Something less than average?

[94] A. Less than average, yes, sir.

Q. He left school at 16. That was in the fourth grade?

A. That is correct.

Q. Have you known much about him since that time?

A. No, I sort of lost contact with HORACE when he left Minnie Hughes in 1974.

Q. Is it possible he could have gone to another school?

A. It is possible, but I don't think he did. I contacted the Middle School and they didn't have any records on him.

Q. But you don't know what he has done with his education since he left the Minnie Hughes School in the fourth grade?

A. No, sir.

Q. Would you know how sophisticated he would be in criminal activities?

A. No, sir.

Q. Nothing further.

COURT: Thank you, sir. Appreciate your coming.

HORACE BUTLER

Being first duly sworn, testified as follows:

COURT: Let the record show that Mr. Hill called the defendant to the stand.

DIRECT EXAMINATION

Q. (By Mr. Hill) State your full name, please.

A. Horace Butler.

Q. Horace, would you mind just answering the questions that I [95] ask you. Okay?

A. All right.

Q. Were you born on October 22, 1958, Horace?
A. Yes, sir.
Q. Did you finish the fourth grade when you were about sixteen years old?
A. Yes, sir.
Q. Have you been to any other grammar schools or high schools Horace?
A. No, sir.
Q. Do you recall being arrested by the Charleston County Police Department?
A. Yes, sir.
Q. On August 30, 1980?
A. Yes, sir.
Q. Where were you arrested, Horace?
A. Corner Cupboard.
Q. In Hollywood?
A. Yes, sir.
Q. Do you recall who arrested you for assault and battery with intent to kill?
A. Frasier.
Q. Okay. And what time were you placed—do you recall what time you were taken to jail on August 30, 1980?
A. It was about 10:30 or 11 o'clock. I don't know.
[96] Q. At night?
A. Yes, sir.
Q. Okay. What time did you awaken that morning, on August 30th, that Saturday morning?
A. 7 o'clock.
Q. Okay. And did you sleep any that day up until the time you were arrested?
A. No, sir.
Q. Did you sleep in the Charleston County jail or were you able to get any sleep in the Charleston County jail on the night of August 30, 1980?
A. No, sir.

Q. Did you get any sleep during the day on Sunday, August 31, 1980?
A. No, sir.
Q. Do you recall my representing you at a bond hearing at the Charleston County jail on Sunday night, August 31, 1980, at approximately 8:30 P.M.
A. Yes, sir.
Q. At that time you were charged with assault with intent to kill, weren't you?
A. Yes, sir.
Q. Did I tell you not to talk with police officers about that charge?
A. No, sir.
[97] Q. You don't recall it? Okay. H'race, after I left you that night did you go back to your jail cell?
A. Yes, sir.
Q. Which one of these officers came and got you out of your jail cell?
A. I don't remember his name.
COURT: Do you recognize him?
A. Yes, sir.
COURT: Point to him.
A. The one with glasses on.
Q. Are you pointing to Mr. John Simpson?
A. Yes, sir.
Q. The third man in the line of fire, the middle man here, on my immediate right?
A. Yes, sir.
Q. What did officer Simpson tell you when he came to your jail cell?
A. He didn't come to the cell. He was out there to the—
Q. To the front?
A. Yes, sir.
Q. Okay. Where all the other Sheriff's Deputies and so forth are at the jail, right?
A. Yes, sir.

Q. Okay. What did you ask officer Simpson?
A. I asked him where I was going and he said I might be going [98] home. That was the answer he give me.
Q. He said you might be going home?
A. Yes.
Q. Did he tell you you didn't have to go with him if you didn't want to?
A. No, sir.
Q. Did anyone tell you you didn't have to go with him if you didn't want to?
A. No, sir.
Q. Did you know you had a right to stay in jail and not go out?
A. No, sir, I didn't know.
Q. Who was with officer Simpson when he took you from the jail?
A. He was by himself.
Q. Where did he take you?
A. Police headquarters, I think.
Q. All right. I notice that you made two statements, allegedly, possibly three. When they started questioning you who was the first ones to question you?
A. Frasier.
Q. Okay. Tell His Honor what Frasier told you.
A. Well, first statement I give him, he wouldn't accept it.
Q. Okay. And then what did he do?
A. He told me I was lying. I don't want to bring out the other.
Q. Bring it out. God sakes, bring it out.
[99] A. Mother fucker, you are lying.
Q. Said what?
A. Said mother fucker, you are lying.
Q. Who said that?
A. Mr. Frasier. And no one was in the room but me and him.

Q. What else did officer Frasier say to you?
A. I told him I didn't do the killing, right. So he told me I was lying, so he hit me up side my head.
Q. How did he hit you, Horace? Show me how he hit you.
A. With the back of his hand.
Q. Were you scared.
A. Yes, sir.
Q. Did he have his gun and badge on?
A. I can't remember.
Q. Were there other officers around?
A. No, sir, not at that time.
Q. Were you scared for your life?
A. Yes, sir, because he told me, said, "Nigger, your black ass is going to fry."
Q. I couldn't hear. Would you repeat that?
A. He told me, "Nigger, your black ass is going to fry."
Q. Frasier told you that?
A. Yes, sir.
Q. What else did he tell you, Horace?
A. That is all I can remember.
[100] Q. Did he mention anything about arresting any members of your family?
A. No, sir, not Frasier.
Q. Oh. Who did, Horace?
A. It was the one with the glasses on.
Q. The one with glasses on?
A. Yes, sir.
Q. Which one?
A. I can't remember. The one with the glasses.
Q. Describe him. What is he wearing? Is it this man?
A. No, sir.
Q. Is it this man?
A. Yes, sir.
Q. You are pointing to officer Simpson?
A. Yes, sir.

Q. And was any members of your family arrested at that time?

A. Yes, they had already arrested my old man.

Q. By your old man, you mean your daddy?

A. Yes, sir.

Q. Horace, why did you sign these statements, if the statements aren't true?

A. Because Frasier.

Q. Frasier is the man that scared you?

A. Yes, sir.

Q. Do you all know Frazier as the little Gorilla? Do you all [101] call him the little Gorilla?

A. Not as I know of.

Q. All right.

A. I asked him why he was hitting me.

Q. Huh?

A. I asked him why he was hitting me.

Q. You asked him why he was hitting you?

A. Yes, and he tell me to my face he ain't hit me, so I reckon I ain't got no feelings. I couldn't feel.

Q. Well, Horace, why would you sign a statement for murder just to keep from getting a little pain from Detective Frasier, assuming he did strike you? You don't know, do you?

A. No, sir.

Q. You live from day to day, don't you, Horace?

A. Yes, sir.

Q. Are you telling His Honor that the statement is not true and that you did not kill that girl?

A. Yes, sir, I did not kill that girl.

Q. That is all the questions I have. Answer any questions that attorney Schmutz has.

CROSS EXAMINATION

Q. (By Mr. Schmutz) Where do you live?

A. Adams Run.

Q. Who do you live with?

A. My father.

[102] Q. You all have a television?

A. Yes, sir.

Q. You do have a television?

A. No, sir. Yes, sir.

Q. Do you watch it?

A. No, sir.

Q. You don't ever watch it?

A. No, sir.

Q. You first told me you didn't have one, didn't you?

A. Yes, sir.

MR. HILL: I don't see the relevancy.

COURT: You talk about this boy being in the fourth grade. He can talk about what his education has been since then. Go ahead.

Q. You say you don't watch television, is that right?

A. Yes, sir.

Q. Never watched TV?

A. No, if I tell you that, I would be telling you a lie.

Q. I want you to tell me the truth now. I don't want you to tell me any lie. Have you ever watched television?

A. Yes, sir.

Q. What programs do you watch? Are you going to answer my questions?

A. Yes, sir, if I could.

Q. What programs do you watch?

[103] A. Well, cowboy movies.

Q. Which one?

A. I don't know the name.

Q. Watch any—do you watch Mash?

A. Yes, sir.

Q. You watch that one?

A. Yes, sir.

Q. You like that one?

A. Well, I just be looking at it.

Q. What other ones you watch? How about Starsky and Hutch? You watch that one?

A. Yes, sir.

Q. That is a good one, isn't it?
A. Yes, sir.
Q. Did you ever watch Kojak?
A. Yes, sir.
Q. Bald headed man?
A. Yes, sir.
Q. Have you ever been arrested before?
MR. HILL: I object to that. What is the relevancy of that?
COURT: It would be relevant to this hearing, not during the jury trial.
Q. Have you ever been arrested before?
A. Yes, sir.
Q. Tell me about it. How many times have you ever been arrested [104] before this time?
A. I guess about four times.
Q. Okay.
MR. HILL: Your Honor, if you are going to allow his questions to be answered concerning his arrest and not his convictions—
COURT: Yes, sir, for the purpose of showing his familiarity with the police and procedures.
Q. I am not going to ask you what you were arrested for. You have been arrested three or four times, is that right?
A. I THINK.
Q. About?
A. About four times.
Q. Did you get carried to jail?
A. Yes, sir.
Q. Police officers ask you any questions?
A. I can't remember.
Q. Did they beat you up on those times?
A. No, sir.
Q. But you are familiar with the police, aren't you?
A. I don't understand.

Q. You stated you have been arrested three or four times, is that right?
A. I think.
Q. Okay. You know a policeman when you see one, don't you, when [105] he has got on a uniform you know him. You don't think he is a mail man or something?
A. No, sir.
Q. As a matter of fact, when you were arrested on August 30th for shooting at somebody, you were read rights to you then weren't you, in an automobile?
A. I don't understand what you are talking about.
Q. Didn't you give the police—
MR. HILL: I don't either. That is a compound question. I'd ask that it be direct.
COURT: Just ask him one part at a time so he can be sure to understand you.
Q. You were arrested for shooting at someone, isn't that right? I mean that is what you were down at the jail for, isn't it?
A. Yes, sir.
Q. Okay. And when you were arrested on that time, we are not talking about this. On that time didn't the police ask you some questions? Didn't they ask you some questions about a person named Tillman? I don't know whether you shot at him or not, but didn't they ask you about him?
A. Yes, sir.
Q. And didn't they at that time read to you, you have a right to a lawyer, you have a right not to answer any questions?
A. I don't remember them reading that.
[107] Q. When did they take you there?
A. Not then, they took me out.
Q. Took you out where the thing happened and rode around?
A. I don't know where it happened at.

Q. I say you rode around and then they took you back to the jail cell?

A. Yes, sir.

Q. When thereafter did you first get in contact with your mama and your daddy or lawyer or anybody? How long after that?

A. I had already got—I already had a lawyer.

COURT: When after that did somebody come to see you, your lawyer or your mama or anybody?

A. Up there that Sunday night when we had the hearing.

COURT: That was your bond hearing?

A. Yes, sir.

COURT: I am talking about after you had talked with these officers and signed these papers. How long was it before somebody came to visit you in jail?

A. I can't remember.

COURT: Did you ask for anybody to come?

A. Yes, sir.

COURT: Who did you ask?

A. You mean who I asked to come?

COURT: Yes.

A. Mr. Hill.

[108] COURT: How long after that did he come? Was it a day or week or how long?

A. It wasn't a week.

COURT: It was within a couple of days?

A. I can't remember.

COURT: All right, sir.

MR. HILL: Your Honor, I have proof of that. I saw him minutes, and I was told, I have proof of that by having the four people here from the jail who can testify when they got Horace out, when they brought Horace back in and when I appeared.

COURT: Well, you can answer my question then. How long after they took him back to his cell did you appear?

MR. HILL: To the best of my recollection, it was that same morning, within an hour or so and that is when the complaint was made. That is when I walked back to these men.

COURT: That is what I wanted to know. How long after his confrontation with law enforcement officers did some independent person see him and you say it was that same morning you were there.

MR. HILL: Yes, sir.

COURT: Thank you. I have nothing further. Any further questions from this gentleman?

MR. HILL: No, sir.

COURT: You can step down, son. Thank you.

MR. HILL: Your Honor, the defense calls Bobby Schuster [109] to the stand.

BOBBY SCHUSTER

Being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Hill) State your full name, please.

A. My nam is Sgt. Charles C. Schuster, Detention Sergeant, in charge there at the Charleston County jail, Sheriff's Dept.

Q. Sir, what is your name?

A. Sgt. Charles C. Schuster.

Q. By whom are you employed?

A. Charleston County Sheriff.

Q. And where do you work?

A. At the county jail.

Q. What shift did you work at the Charleston County jail on Sunday night, August 31, 1980?

A. I didn't work that night, sir.

Q. How about the next morning?

A. I come on, I believe I was on the evening shift, 3:00 to 11:00 that day. I can't tell exactly because I don't know what the schedule was back in September.

Q. All right, sir. Did you work the shift from 3:00 until 11?

A. I believe I was on 3:00 to 11 that time. I would like to enlighten the statement as to why I am uncertain, because at that time I was on periods of off and on work because of severe illness and I don't recall unless I would look back at the jail [110] records if I did work that day or not.

COURT: Mr. Hill, let me suggest this. If you want to elicit from this witness or any other witnesses the particular chronology of events, it is quite possible that you and the solicitor could agree on those, as to when he was picked up and when he was taken back. I don't think there is any dispute about that.

MR. HILL: All right.

COURT: Sgt. Frasier, what time did you say he was brought to you?

SGT. FRASIER: He was brought to the Charleston County Police Department, I walked in the detective office, Your Honor, exactly 12:50. I understand that Simpson picked him up at the county jail, records state at 12:15.

COURT: Is that basically what you contend?

MR. HILL: Yes, sir.

COURT: What time was he taken back to his cell?

SGT. FRASIER: I looked at the record vaguely, but I believe he was taken back to the county jail at 10:30 that morning, after we leave the Adams Run area from the scene where the alleged rape took place.

COURT: Is that what you contend, Mr. Hill?

MR. HILL: I think we have another officer, officer Cochrane, who could tell us what time they brought him back.

COURT: Do you contend that it was other than 10:30?

[111] MR. HILL: No, sir, it was in the early morning hours.

COURT: All right, sir. Then those two facts are not in issue. How about when you arrived, if you are interested in that?

MR. HILL: I am interested and I am not exactly sure.

COURT: What time do you estimate?

MR. HILL: I think it was that day. I am sure it was that day because I asked who worked the shift that night.

COURT: All right. What time do you say you got there?

MR. HILL: I think approximately 11:00. It was right after he was brought back in.

COURT: Within an hour or so?

MR. HILL: Yes, sir.

COURT: Do you take issue with that, solicitor?

MR. SCHMUTZ: If you will indulge me just a minute, Your Honor. Do you have what time Mr. Hill came to jail?

A. No, sir. Mr. Hill had made previous visits to Horace Butler. On the morning in question he came to the jail and he went back to the conference room.

MR. SCHMUTZ: No, I am asking you do you know what time he came to jail? Do you know how much time elapsed between Mr. Butler, when he had gotten there and Mr. Hill?

A. No, sir.

MR. SCHMUTZ: Do you have any idea? I don't have anything to go on but what Mr. Mack Hill says.

[112] COURT: All right. Let's let the record show then that it is agreed by the parties that the defendant was taken from the county jail at the request of Sgt. Frasier about 12:00 o'clock on the morning of the first, he was returned approximately 10:30 the next morning and that his counsel came to the jail to see him within an hour or so after he was returned. Any dispute about those facts?

MR. SCHMUTZ: I don't have any dispute. I will have to take Mr. Hill's word for it.

MR. HILL: If there is no dispute, then I see no reason to detain these four witnesses.

COURT: I do not either. That was my point. If we are not arguing about anything, we can agree on it. Thank you, Sgt.

MR. HILL: I have one other witness. Officer John Simpson of the Charleston County Police Department. I say I have one, Your Honor. I would not want to be limited to that.

COURT: You would not be.

JOHN J. SIMPSON, JR.

Being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Hill) State your full name, please.

A. John J. Simpson, Jr.

Q. Officer Simpson, will you recall back for me until the time of Sunday night, August 31, 1980, at Charleston County jail? Do you remember seeing me at the bond hearing?

[113] A. Yes, sir, I do.

Q. Do you recall my telling you that Horace Butler was not to speak with anyone concerning that charge?

A. No, sir, I do not.

Q. You don't recall?

A. No, sir, I don't remember you saying that.

Q. After Horace was put back in jail and you and I walked out, do you recall having a conversation with me?

A. No, sir, I don't remember having a conversation with you on the night of the 30th.

Q. Okay. Did we discuss that the bond was too high, do you remember, that the bond was too high? You know

you said something like the family has got a bad reputation or something, do you remember that?

A. No, sir, I don't remember making a comment to that effect. I do remember the bond was set fairly high.

Q. Okay. Who sent you to the jail around midnight or at 12:15 A.M. on September 1, 1980?

A. Sgt. Frasier instructed me to go to the jail and pick up Horace Butler and take him to the Charleston County Police headquarters to the detective office.

Q. Did you just hear Horace Butler state that when Horace asked you where he was going, you said you may be going home?

A. Yes, sir, I heard him say that.

Q. Now, officer Simpson, did you tell him that?

[114] A. NO, sir, I did not.

Q. You didn't tell him that?

A. No, sir.

Q. Where did you tell him you were going?

A. He asked me where we were going and I told him Sgt. Frasier and myself wanted to talk to him. We were going to the Charleston County Police station, if he had no objection. He said he didn't mind.

Q. Were you with Detective Frasier during the time that Horace was being interrogated?

A. Either myself or Detective Greer were with him at all times. There was two of us with Mr. Butler at all times.

Q. How do you know who was there if you weren't there?

A. Because I was in the detective office, either myself or detective Greer was in the interrogation room with Sgt. Frasier at all times.

Q. Did you tell Horace Butler that you all would arrest his whole damn family?

A. No, sir, I did not.

Q. Was officer Cochrane there that night?

A. He was part of the time, not all of the time.

Q. Did you ever hear Detective Sgt. Frasier threaten Horace Butler?

A. No, sir.

Q. Did you ever see Sgt. Frasier strike Horace Butler?

[115] A. No, sir, I did not.

Q. If you saw any of these offenses occur, would you testify in court with your good friends and peers on the force present with you?

A. Yes, sir, I most certainly would.

Q. Your Honor, I have no further questions.

MR. SCHMUTZ: I don't have anything, Your Honor.

COURT: Thank you, sir.

MR. HILL: Your Honor, that is the case for the defense.

COURT: All right, gentlemen. If you want to argue, give me about thirty seconds. Mr. Hill, it is your motion. Incidentally, your notice to suppress evidence violating his First, Fourth, Fifth and Fourteenth Amendments rights. I assume you are not concerned with the First Amendment. He doesn't have any rights under the First Amendment, does he?

MR. HILL: Freedom of speech? Contained within the freedom of speech is the right not to speak. So the First Amendment could conceivably be involved.

COURT: I thought we were dealing with the Fifth Amendment here.

MR. HILL: Well, we are, Your Honor. Maybe I am wrong.

COURT: Well, that is quite all right. I just wanted to be sure I was understanding your legal position.

MR. HILL: All right, sir.

COURT: But I think the question is the Fifth Amendment [116] right.

MR. HILL: Well, Your Honor, what we have is a man with a fourth grade education. Statement says he

is 23. At the time he was only 21. He wouldn't have been 22 until October 22 and if His Honor will read these statements, His Honor will surely tell that as to his experiences, it wasn't written or dictated by a man with a fourth grade education. Your Honor, what we have is a poor, uneducated, black man who was coerced into making a statement. Quite naturally the officers aren't going to get up and say yes, we did it. They are too professional for that, but Your Honor, these beatings occur. You know it. Everybody knows it. I am a former Magistrate myself for five and a half years. These things happen. I submit to you, Your Honor, it happened here. Now, you or I, no one else probably in the courtroom, just as we were receiving some pain, if we were, a threat, we wouldn't admit to a murder. But Horace lives from day to day, Your Honor, and you could tell by the questions you asked, he didn't understand. You can imagine the problem I am having and I live out in that section. I have been knowing him all my life. I have been conversing with black people and I don't mean that in racial slang. I know them. I grew up with them. I played with them. I understand them as much as most people can. Horace gave the statement because he was scared of Frasier. Frasier broke his will and, Your Honor, I hope you have read my statement, my memorandum of law.

[117] COURT: I have.

MR. HILL: Read the case law relating to that and I would like to read some of the case law.

COURT: I have read it.

MR. HILL: You have read it thoroughly? All right, sir. By the state's own admission, and we stipulated, that the man was arrested on August 30th some time in the P.M. He was in jail, incarcerated. He was taken out of jail at 12:15 A.M. on September 1. The final statement, whether it is the second or third or whatever connotation they want to apply to it, the final statement

was given at 5:45 A.M. after this man had been without sleep for almost 48 hours. He was weakened. He was tired. He was scared. He was in an alien environment and the man signed. He didn't know what he was signing. And for that reason, Your Honor, the statement should be suppressed. And one other reason, while we are on this motion, Your Honor, Sub-Section 19-1-80, in the event His Honor overrules my first motion to suppress, the Section 19-1-80 requires that the state give a copy of a statement made by a witness or a defendant to a public employee, for example, an employee of the county police, an exact copy of the statement he signed. Detective Sgt. Frasier, whether the machines were broke down or for whatever reason or whether he wanted to put in the right times later, not accusing him of anything, if he wanted to put in the right time later to jive with Horace's statement and [118] Larry White's statement, for one reason or another, Horace Butler, neither Horace Butler nor I were furnished with a copy of either statement from September 1st until September 22nd, the date of the preliminary hearing before Judge Johnson in Adams Run. And at that time, while His Honor may seem irrelevant, officer Simpson didn't even appear at the preliminary hearing for assault with intent to kill. That matter has been dismissed and he has not been indicted for that offense for which he was originally incarcerated. So all of those reasons combined, Your Honor, I submit that His Honor should not allow the statement, the involuntary statement, I am not going to dignify them by calling them confessions, the involuntary statements should not be allowed. They should be suppressed, they should be considered a motion In limine. No mention should be made of the statements before the jury, and if His Honor denies that motion, then Sub-Section 19-1-80, a literal interpretation thereof, prohibits the state of South Carolina from cross examining the defendant when they did not give him a copy of the statement.

COURT: All right, Solicitor. What is your section there?

MR. HILL: 19-1-80, Your Honor.

MR. SCHMUTZ: Your Honor, to address the voluntariness of the statement, I rely on Sgt. Frasier's testimony. I would point out that the cases say to look at the totality of the circumstances when you are looking at a voluntary waiver of [119] rights. I will submit in this case Mr. Butler was read his warnings to a tedious degree, understood them, signed them. He was given breaks, he was given coffee on three different occasions, given doughnuts, asked if he wanted to return to bed and start giving a statement the next day. I will, also, point out that Mr. Butler on the stand stated he had been arrested on at least four occasions before. I submit that he even had his warnings read to him only a day before. I also point out that he was with his attorney hours before this interrogation, with his attorney at the bond hearing I believe on the night of the 31st. As far as his education, his principal said he was rather sophisticated, had a rather sophisticated vocabulary. When I talked to him on the stand he said he watched television programs. He knew what was going on. I submit nothing improperly done at all in the eliciting of these statements. Your Honor, to address the second issue which was the officers not providing Mr. Butler with a copy of the statement which he gave on the morning of September 1st, Sgt. Frasier said the reason for not giving him that statement was that the copy machine had broken down and indeed he was furnished one on September 22nd, which, of course, is almost three months ago. He has had ample time to review that statement. There is no surprise. There is no prejudice to him. Your Honor, I would ask you to look at a case called State vs. Jones, which is annotated in the South Carolina Code under 19-1-80 and it [120] states if there is a reason for not giving one and he is given one

on time. In other words, the reason for that law is that you don't pull out a confession and put him at an unfair advantage and I don't think he has been placed in any unfair advantage.

COURT: What were the general times at which these statements were taken?

MR. SCHMUTZ: The general times, Your Honor?

COURT: He was picked up about 12 o'clock and brought down to the police station.

MR. SCHMUTZ: Yes, sir.

COURT: When was the first statement taken?

MR. SCHMUTZ: The first statement was transcribed at 2:55 A.M., the second one at 5:45.

COURT: Wait a minute now. Where do you get A.M.? Did you pick him up at night?

MR. SCHMUTZ: Yes, sir.

COURT: Oh, I thought you meant in the afternoon.

MR. SCHMUTZ: No, sir, about 12:30 in the afternoon.

MR. SCHMUTZ: No, sir, about 12:30 A.M. when he was picked up.

COURT: Brought down town to the police station. One statement was given two and a half hours later?

MR. SCHMUTZ: Yes, sir.

COURT: Approximately. The other one was given three [121] hours thereafter?

MR. SCHMUTZ: Yes, sir.

COURT: For a total of five or six hours interrogation?

MR. SCHMUTZ: Yes, sir, subtracting the time that we had coffee and doughnuts, which I will remind Your Honor the officer said about thirty minutes each time. The way these statements were given, they were given verbally and then written down.

COURT: Then the officer said when it got light that morning the defendant went with them to the scene, looked around?

MR. SCHMUTZ: Yes, sir.

COURT: And by 10:30 the next morning he was back in his cell?

MR. SCHMUTZ: Yes, sir.

COURT: So he had been gone from his original cell somewhat less than twelve hours?

MR. SCHMUTZ: Yes, sir.

COURT: I had my A.M.'s and P.M.'s confused. Mr. Hill, I am going to deny your motion to suppress the admission of the statements given by the defendant. I don't think this matter is presented to me to be the finder of facts based on the evidence presented in this hearing. I don't think the circumstances come within any of the categories in which our courts have said the trial court, based on those circumstances, should have excluded the statements as being either involuntary or as not having complied with the court's directions in the [122] Miranda case. Your client testified he did not even deny Sgt. Frasier's assertion that on three different occasions they took breaks, officers brought him coffee and doughnuts, the total time of interrogation was approximately five hours, which I don't think comes by any stretch of the imagination within the purview of the will-breaking, bone-tiring interrogation which the court has referred to in other cases. If the defendant had been physically mistreated, you say you were in his presence within an hour after he was brought back to his cell. Had he been bruised, battered or cut in any way, showing any evidence of being physically mistreated, you would have been entitled to take pictures of him and have him examined by a doctor. No such evidence was submitted here. Finally, with reference to the intelligence level of the defendant, this is not a naive person who they snatched up off the street and taken into some bewildering situation. I think the converse is a fair fact, that is a rather street rise young man. He admits having been arrested four times. He would tend to be familiar with the police and their arrest procedures, that

type thing, anything who had been arrested four times at the age of 21 would not be naive or tend to be terribly frightened at the sight of police officers. He apparently is used to being in their presence from time to time. So I am making a finding of fact beyond any reasonable doubt that this defendant was afforded his Fifth Amendment rights as enunciated by [123] the United States Supreme Court in the Miranda case. I think the evidence is replete with these officers having afforded him every warning that he did not have to talk with them if he did not wish to, not on one, but on several occasions. I also find as a fact that the statements which he gave were voluntary, they were made without coercion on the part of the law enforcement officers, without any threat, without any promise, without any inducement to the defendant. I make that finding also beyond any reasonable doubt. The written statements and any oral statement of which the solicitor had is evidence will be admissible.

* * * *

EXCERPTS FROM POST-CONVICTION RELIEF HEARING

* * * *

[277] MR. ZELENKA: The State would call Mr. McAlister Hill, please.

WILLIAM McALISTER HILL, being duly sworn, testified as follows:

* * * *

[279] Q. Were you retained to represent Mr. Horace Butler on these charges?

A. I was retained.

Q. Were you retained around July—excuse me, August 31st of 1980, after Horace had been charged with another incident?

A. Yes, sir. Well, first I had represented Horace in a [280] workmen's compensation case, and we were very successful in that. I liked Horace very much. I still do. I don't want him electrocuted.

Horace is a nice man. I—he's my friend, but, anyhow, I also represented Horace on another matter prior to the August 30th matter.

On August 30th, I went to—Horace was arrested on August 30th. I'm sorry. On the 31st I went to a bond hearing, and at this bond hearing—it was for assault and—assault with intent to kill. I believe that was the charge. A charge of shooting Kenneth Kelman at the Little Brown Jug, which is owned by Mr. Willie Moultrie, the uncle of Horace Butler.

I recall vividly telling Horace not to talk with the police officers. That was on August 31st. Also, I recall telling John Simpson in walking to the automobile again not to talk with Horace.

Now, that night they went to the jail and they got Horace out. I had told Horace not to talk with them, but they got him out—I didn't know—you see, I did not know that Horace was a suspect in a murder and kidnapping and rape on the 31st.

Q. All right.

A. I had told him not to talk about the other charge. I didn't tell him not to talk about the murder because I [281] had no reason to believe he was involved in it.

Q. When did you first learn that Horace was charged with murder—with the murder charge?

A. To be perfectly honest with you, I don't exactly—I remember it was the—I remember going to the jail on September first at about eleven o'clock, and I think the transcript would reveal that. That's stipulated to by the Solicitor's Office. I had several witnesses to come to Court and testify that that's basically what time it was.

So I would say I saw him on September first. That's the first time I talked with him.

* * * *

[201] MR. COBB: If it please the Court, we'd call Mr. Horace Butler.

HORACE BUTLER, being duly sworn, testified as follows

* * * *

[218] Q. You were arrested sometime after that, and you were put in the County Jail?

A. Yes, sir.

Q. Did you call Mr. Hill to represent you?

A. Yes, sir. I called my sister.

Q. You called your sister?

A. Yes, sir.

Q. What did you ask your sister to do?

A. To call Mr. Hill or to go by the house and tell my old man to go see Mr. Hill.

[219] Q. You wanted Mr. Hill to represent you?

A. Yes, sir.

Q. And did Mr. Hill come down to Charleston to represent you?

A. Yes, sir.

Q. And you had a bond hearing out at the County Jail, right?

A. Yes, sir.

Q. And Mr. Hill talked to you and discussed with you wanting to represent you?

A. Yes, sir.

Q. Did you ever hear Mr. Hill tell the police officers not to talk to you?

A. Yes, sir. That correct.

Q. Pardon me?

A. Yes, sir.

Q. Did you want to talk to the police officers?

A. No, sir.

Q. Did Mr. Hill tell you not to talk to the police officers?

A. Yes, sir.

Q. You thought that was good advice?

A. Yes, sir.

Q. You wanted to take that advice?

A. Yes, sir.

[220] Q. Now, after Mr. Hill left, you were still at the County Jail?

A. Yes.

Q. How long after that was it before the police officers came and picked you up?

A. Maybe one or one thirty that night.

Q. One or one thirty?

A. Yes.

Q. That same night, or very early the next morning? Is that what you're saying?

A. I can't remember now.

Q. All right. Was it late at night though?

A. Yes, it was late because I was asleep.

Q. You were asleep?

A. Uh huh.

Q. They came and got you from the County Jail?

A. Yes, sir.

Q. Do you know where they took you?

A. Back to their headquarters or whatever.

Q. And you went over and there were some other police officers over there?

A. Yes, sir.

* * * *

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

(Title Omitted in Printing)

ORDER

January 28, 1984

This matter comes before this Court by way of an Application for Post Conviction Relief dated October 15, 1982. The Applicant is represented in this present action by Dale T. Cobb, Esquire, of the Charleston Bar. The Respondent is represented by the South Carolina Attorney General's Office. A hearing was heard during the March 28, 1983, term of post-conviction relief hearings in Charleston. A decision in the matter has been held in abeyance pending post-trial hearing memorandum from the Applicant's counsel. On July 29, 1983, the Court received the memorandum from the Applicant. The Respondents waived filing a response unless requested by the Court. Upon review of the entire record, this Court makes the following findings of fact and conclusions of law.

I.

STATEMENT OF THE PROCEEDINGS

The Applicant, Horace Butler, is presently confined at the Central Correctional Institution as a safekeeper pending a stay of execution from the South Carolina Supreme Court until a final determination from this proceeding dated November 10, 1982. The Applicant was indicted during the October, 1980, term of the Court of

General Sessions for Charleston County for the crime of murder. The Applicant was represented by retained counsel, W. McAlister Hill, Esquire, of Ravenel, South Carolina. The Circuit Solicitor served timely notice upon the Applicant that the State intended to seek the death penalty on December 4, 1980. Thereafter, the Applicant began his trial before a jury of his peers on January 19, 1981, and the Honorable C. Anthony Harris, Presiding Judge. On January 24, 1981, the Applicant was found guilty of murder. On January 26, 1981, after a sentencing hearing before the same jury, the jury returned a verdict recommending the imposition of the death penalty finding as a statutory aggravating circumstance that murder was committed while in the commission of the crime of rape. Following this recommendation, Judge Harris sentenced the Applicant to the death penalty.

On January 29, 1981, the Applicant, through counsel, filed a timely Notice of Intention to Appeal his conviction and sentence. In pursuit of his appeal, his attorney was assisted by David I. Bruck, Esquire, of the South Carolina Office of Appellate Defense. In his appeal to the South Carolina Supreme Court, the Applicant raised the following exceptions:

> 1. The trial judge erred in failing to quash the petit jury venire where it appeared that the venire had not been drawn according to statute, since 98.7% of the names drawn began with the letters A through MO.
>
> 2. The trial judge violated S. C. Code § 16-3-20(E) and appellant's right to an impartial and fairly-selected jury by disqualifying the jurors Chartrand, Burnell, Moorer, Crawford, Kitts, Ancrum, Breland and Bellamy by reason of their beliefs or attitudes against capital punishment, where there was no evidence that such beliefs would have prevented them from making an impartial determination of appellant's guilt or innocence.

3. The trial judge erred in qualifying the juror Jennings B. Knight where the record of the juror's voir dire examination, taken as a whole, shows that he would have voted to impose the death penalty in every case, regardless of the circumstances, where a defendant's guilt of murder had been established.

4. The trial judge erred in permitting the solicitor to elicit from the state's witness White irrelevant and prejudicial testimony to the effect that he had seen appellant with a pistol on other occasions prior to the night of the homicide, and that appellant was "known to carry a pistol."

5. The trial judge erred in admitting a written statement of appellant which had been taken by the police and of which appellant had not been provided a copy at the time that the statement was made, as required by S. C. Code § 19-1-80 (1976).

6. The trial judge erred in refusing to permit appellant to cross examine the state's witness Ancrum as to whether Ancrum had killed his own brother. This line of inquiry was relevant to the witness' credibility, and the trial judge's ruling therefore denied appellant his constitutional right to confront and cross-examine the witness.

7. The trial judge erred in refusing appellant's request to submit the lesser included offense of manslaughter to the jury. This was error because the evidence before the jury was susceptible to the interpretation that appellant was guilty only of manslaughter.

8. The trial judge erred in denying appellant's request to instruct the jury on the law regarding circumstantial evidence, where the state's case against appellant was largely based on such evidence.

9. The trial judge erred in failing to instruct the jury to disregard appellant's written confession unless it first found that he had been provided with a copy of it at the time it was made.

10. The trial judge erred in failing to direct a recommendation of life imprisonment, and in finding that the death penalty was warranted under the evidence in the case, where the evidence viewed most favorably to the state was insufficient to convince a rational trier of fact beyond a reasonable doubt that the murder of the deceased was committed by appellant while in the commission of rape.

11. The trial judge erred in instructing the jury at the penalty phase of appellant's trial that a reasonable doubt is "a serious or strong or substantial well-founded doubt." This instruction, which was materially different from that given at the guilt phase of appellant's trial, was erroneous because it impermissibly lessened the state's burden to prove its case in aggravation of punishment beyond a reasonable doubt.

12. The trial judge erred in instructing the jury that any recommendation of life imprisonment must be by unanimous decision of the entire jury, where no such requirement is imposed by law.

In his brief to the Supreme Court, the Applicant argued the following questions:

I. Did the disqualification of jurors on the basis of their opposition to the death penalty violate S. C. Code § 16-3-20(E) and appellant's right to an impartial and representatively-drawn jury? (Exception 2).

II. Was the juror, Jennings B. Knight, erroneously qualified despite statements on voir dire examination which showed that he would have automatically voted to impose the death penalty in every case of murder, regardless of the circumstances? (Exception 3).

III. Did the solicitor improperly attack appellant's character and reputation by eliciting testimony to the effect that appellant was "known to carry a pistol"? (Exception 4).

IV. Were S. C. Code §§ 8-15-50, 19-1-80 and 19-1-90 violated by the admission of written statements by appellant of which he had not been given copies at the time of making? (Exception 5).

V. Did the trial judge err in failing to submit the issue of the state's compliance with the "copy rule" statutes to the jury? (Exception 9).

VI. Should the trial judge have charged manslaughter? (Exception 9).

VII. Was appellant's constitutional right to grand jury indictment violated by the court's submission to the trial jury of the state's allegation of rape when no grand jury review of such allegation had ever occurred?

VIII. Is the evidence of rape sufficient to warrant appellant's execution? (Exception 10).

IX. Did the trial judge's definition of reasonable doubt at the penalty phase of appellant's trial impermissibly lessen the state's burden of proof? (Exception 11).

X. Did the trial judge err in failing to explain to the jury the actual consequences of their failure to agree on appellant's punishment? (Exception 12).

XI. Does this Court's construction of the scope of its comparative review of death sentences pursuant to S. C. Code § 16-3-25(C)(3) render South Carolina's death penalty procedure unconstitutional?

On February 22, 1982, the South Carolina Supreme Court, in an opinion by the Honorable Julius B. Ness, affirmed the conviction and sentence of death. *State v. Butler*, —— S.C. ——, 290 S.E.2d 1 (1982).

The Applicant made a timely Petition for Writ of Certiorari to the United States Supreme Court which denied the Petition, with Justice Brennan and Justice Marshall dissenting on October 12, 1982.

On November 10, 1982, after this Application had been filed, the South Carolina Supreme Court substituted Dale T. Cobb, Jr., Esquire, of Charleston, South Carolina, as the Applicant's counsel. The Court also ordered:

> Petition for Stay of Execution granted until the Circuit Court for Charleston County has made a final determination of the Application for Post Conviction Relief and this Court has made a final determination on any appeal therefrom.

– II.

POST CONVICTION RELIEF ALLEGATIONS

In his Application for Post Conviction Relief dated October 15, 1982, as amended, March 30, 1983, the Applicant made the following allegations:

> I. Applicant Butler has been deprived of the effective assistance of counsel in the guilt phase of his trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 14, of the South Carolina Constitution.
>
> (1) The transcript taken as a whole reveals a lack of competence on the part of trial counsel as evidenced by the following:
>
> > (a) The defense attorneys allowed hearsay evidence in the most critical areas of the case without objection. (WITHDRAWN DURING HEARING).
> >
> > (b) The defense allowed highly inflammatory evidence to be received in the trial without objection.

(c) The defense failed to thoroughly investigate the case by failing to interview the vast majority of the prosecution witnesses. (WITHDRAWN DURING HEARING).

(d) After realizing that the Solicitor would agree to a life sentence, counsel failed to communicate that fact to the Applicant, and to meaningfully explain the consequences of proceeding to trial and not accepting the offer.

(e) The defense failed to develop either any effective cross-examination or any examination whatsoever of critical state witnesses. (WITHDRAWN DURING HEARING).

(f) The defense failed to argue its case to the jury adequately. (WITHDRAWN DURING HEARING).

(g) Counsel failed to adequately research questions of law that were likely to arise at trial.

(h) Counsel failed to properly prepare cross-examination for forensic experts called by the state and to offer defense experts to contradict their testimony. (WITHDRAWN DURING HEARING).

(i) Counsel failed to properly prepare the Applicant for his testimony at trial regarding the admissibility of his alleged confession and further that he failed to elicit testimony from the Appellant concerning the voluntariness of his confession in front of the jury so that they, as the ultimate triers of fact, could properly weigh the evidence in determining if the fact that the Applicant had intelligently, voluntarily and knowingly confessed to this offense.

(j) Counsel failed to raise and preserve the issue of the Applicant's interrogation of the police

department, knowing the Applicant had an attorney and that he had allegedly instructed the police department not to question the Applicant.

(k) Counsel failed to call himself as a witness or to present competent testimony regarding his instructions to the police not to question him. Further, counsel failed to recuse himself as attorney of record, when it became apparent that his testimony was going to become crucial on the motion to suppress the confession.

(l) Counsel failed to call witnesses to establish an alibi defense, knowing that those witnesses were available and present in court.

II. Applicant has been deprived of his right to effective assistance of counsel at the *sentencing phase* of his trial in violation of the Sixth and Fourteenth Amendments and Article I, Section 14, of the South Carolina Constitution.

1. Counsel failed to undertake a sufficient and meaningful factual investigation for the sentencing portion so as to be able to present mitigation evidence.

2. Counsel failed to present mitigation evidence although there were witnesses who would have presented favorable mitigating testimony.

3. Counsel failed to prepare Applicant adequately for the only opportunity he had to present himself to the jury in a positive and effective way.

4. Counsel failed to present any meaningful agreement in mitigation to the trial judge after the jury reached its verdict in the sentencing phase. (WITHDRAWN DURING HEARING).

5. Counsel failed to object to the introduction of highly prejudicial and irrelevant testimony in the sentencing phase.

III. Applicant Butler was denied his right to a sentencing proceeding free of arbitrariness, prejudice and passion in violation of the Eighth and Fourteenth Amendments by reason of the fact of admission of irrelevant and inflammatory evidence during the guilt phase, which was subsequently re-introduced.

1. The transcript is replete with the state offering into evidence the victim's garments, photos of her body, personal items, and testimony regarding the victim's personality, all of which was irrelevant, inflammatory and prejudicial.

IV. Applicant was denied his right to a fair and reliable jury determination of his guilt or innocence, in violation of the Eighth and Fourteenth Amendments, by reason of the trial judge's charge in the guilt phase that a reasonable doubt was a substantial doubt.

1. The trial judge at the beginning of the trial, at the guilt phase, and at the sentencing stage, equated reasonable doubt with being substantial doubt.

V. Applicant was deprived of his right to a guided exercise of jury sentencing in a capital case, in violation of the Eighth and Fourteenth Amendments by virtue of the trial court's use of the common law definition of rape as opposed to the statutory definition of sexual battery.

1. The trial court refused to charge the statutory definition of criminal sexual battery in the penalty phase and in its place charged the common law definition of rape and used that term which had a prejudicial effect of denying Applicant the protection of a statutory law regarding the purported aggravating factor.

VI. Butler was denied his right to a fair and reliable jury determination of his guilt in violation of

the Eighth and Fourteenth Amendments, by reason of the trial judge's refusal to charge the law of circumstantial evidence at the guilt phase.

1. The trial judge refused to charge the law of circumstantial evidence despite the state's alleged use of such evidence.

VII. Applicant was denied his right to a fair and reliable jury determination of his guilt or innocence, in violation of the Fifth, Sixth, and Fourteenth Amendments, by reason of the trial judge's admitting into evidence an alleged statement made by the Applicant.

1. The trial judge never found as a matter of law that the Applicant had voluntarily, knowingly waived his rights to either remain silent or to have counsel present prior to giving a statement.

VIII. Applicant Butler was denied his right to a fair and reliable jury determination of his guilt in violation of the Eighth and Fourteenth Amendments, by reason of the trial judge's failure to ascertain whether or not Applicant's trial counsel was qualified to represent him in a case in which the state was seeking the death penalty.

1. At the call of the case, the trial judge never required of counsel nor did he determine pursuant to § 16-23-26(B) if counsel had the requisite experience to represent Applicant in a case in which the state was seeking the death penalty.

III.

INEFFECTIVE ASSISTANCE OF COUNSEL

The Applicant's allegations I, II, and VIII concern an allegation that the Applicant did not receive the effective assistance of counsel during his guilt and sentencing phases that led to his conviction and sentence of

death. Therefore, this Court will briefly review the general background in this area and then apply it to the findings of fact.

The Sixth Amendment states that, "In all criminal prosecutions, the accused shall have the right . . . to have the Assistance of Counsel for his defence." UNITED STATES CONSTITUTION, Amend. VI. In *Powell v. Alabama*, 287 U.S. 45, 71 (1932), the Court held that the Constitution mandated an "effective appointment" of counsel in a capital case. In *Glasser v. U.S.*, 315 U.S. 60, 70 (1942), the Court held that the Sixth Amendment requires that the assistance of counsel in a federal court be "untrammelled" and "unimpaired" by the trial court. This Court later found a presumption of effectiveness of counsel that the evidence in *Michel v. Louisiana*, 350 U.S. 91, 101 (1955), did not overcome. The Court's observations evolved into a set of general rules that have been adopted by state and federal courts. They are:

> (1) All attorneys who are admitted as members of the bar are presumed to be competent, and are presumed to have acted competently in any given situation; (2) the fact that counsel was physically or mentally ill, aged, intoxicated, young, or inexperienced, does not itself overcome the presumption of effectiveness; (3) such facts, however, may be combined with other evidence to establish a claim of ineffectiveness; (4) great deference is to be given to attorneys in the area of trial strategy and trial tactics; (5) courts will not judge an attorney's performance on the basis of hindsight; and (6) effective representation does not mean that the lawyer has to be perfect or infallible, or that the defendant has to prevail. 5 AM.JUR. *Proof of Facts* 2D, Ineffective Assistance of Counsel § 4 (1975).

Gideon v. Wainwright, 372 U.S. 335 (1963), held that the Sixth Amendment guarantee was a fundamental

right essential to a fair trial and binding on the states by virtue of the Fourteenth Amendment.

In *McMann v. Richardson*, 397 U.S. 759, 771 (1970), the Court discussed, in dicta, advice given by counsel. For the first time, the Court hinted at an objective standard which trial courts should strive to maintain. The Court commented that whether advice is competent:

> Depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether the advice was within the *range of competence* demanded of attorneys in criminal cases. On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts. (Emphasis added).

The Court further stated, citing *Jackson v. Denno*, 378 U.S. 368 (1964), that a defendant alleging that he was incompetently advised by his attorney and seeking to make a collateral attack in federal court on a guilty plea in state court must demonstrate "gross error on the part of counsel." *McMann*, 397 U.S. at 772. The right to counsel guaranteed by the Sixth Amendment was extended to all cases in which a defendant might be imprisoned. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Court held that the Sixth Amendment right applies equally whether counsel is appointed or retained.

South Carolina case law reveals that it is presently applying the range of competency standard that has evolved from *McMann. Shaw v. State*, 277 S.E.2d 140 (S.C. 1981). *State v. Pendergrass*, 270 S.C. 1, 239 S.E.2d 750 (1977). *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977). In addition, the Court places the burden of proof of showing ineffectiveness including the burden of showing prejudice on the Applicant. *Kibler v. State*, 267 S.C. 250, 227 S.E.2d 199 (1976). While the Court has not adopted the standard of prejudice in clear terms, this Court finds that a defendant asserting an ineffective assistance of counsel claim must demonstrate that his counsel's failings "worked to his *actual* and substantial disadvantage." *Washington v. Strickland*, 693 F.2d 1243, at 1258 (emphasis in original) [quoting *U.S. v. Frady*, 456 U.S. 152, 170 (1982)]. "A failure to prove that he was prejudiced, like a failure to prove that his attorney's efforts were inadequate, results in a denial of the writ (of habeas corpus)." *Baldwin v. Maggio*, 704 F.2d 1325, at 1333 (5th Cir. 1983).

Although the United States Supreme Court has granted Florida's petition for a writ of certiorari in *Washington v. Strickland, cert. denied*, —— U.S. ——, 103 S.Ct. 2451 (1983) and it will be argued this term, this Court is of the opinion that it is unlikely that the Supreme Court will adopt a prejudice standard less stringent than that identified by this Court. See: *U.S. v. Frady*, 456 U.S. 152, 170 (1982).

In reviewing the quality of counsel's representation, this Court takes care that the "finely ground lens of 20/20 hindsight" does not affect our vision. *Williams v. Maggio*, 695 F.2d 119, at 123 (5th Cir. 1983). The standard of competence required of trial counsel "is no higher in capital cases than in noncapital cases." *Bell v. Watkins*, 692 F.2d 999, 1008 (5th Cir. 1982).

a.

Guilt Phase Issues

In his first guilt phase counsel issue, the Applicant contends that counsel allowed highly inflammatory evidence to be received in the trial without objection. [I(b)]. During the hearing, this Court was given the opportunity to take judicial notice of the real evidence presented during the original trial. See (Tr. p. #3-A - #3-C). The record reveals that counsel made timely objections to the introduction of evidence. (Tr. pp. 21-22, 68-69, 128, 132-133, 563-565, 590, 602, 837-842). This Court fails to see how this evidence was so highly inflammatory that the trial court should not have allowed its introduction. The Applicant has wholly failed to present any evidence to support his contention that certain evidence was unconstitutionally inflammatory or that counsel failed to perform within the proper standard by failing to object. Therefore, allegation I(b) is without merit and must be dismissed for these reasons.

In allegation I(d), the Applicant contends that counsel failed to advise his client about a possibility that the Solicitor might agree to a life sentence. This Court finds that counsel advised his client before trial that if he pled guilty that there was a possibility that the State would no longer seek the death penalty, but that decision was up to Butler whether he would plead guilty or not. The Applicant, however, advised counsel that he would not plead guilty to anything that he did not do. This Court further finds that there were no formal negotiations in which the State offered life imprisonment in return for a plea. This Court finds that the Applicant has failed in his burden of proof in showing that the State, who rejected counsel's overtures to plea, would have ever taken such a plea if counsel would have been more persistent. Absent such an offer, his allegation lacks a factual basis as well as legal merit and must be dismissed.

In allegation I(f), the Applicant alleges that counsel failed to research questions of law that were likely to arise at trial. In the post-hearing memorandum, the Applicant claims that his counsel did not understand that he did not have the burden of disproving the voluntariness of the confession. This Court specifically rejects this assertion. The record reveals that prior to the *Jackson v. Denno* hearing on counsel's motion to suppress the confession the following transpired after the trial court had advised counsel for the Applicant to proceed:

> *Court*: Hold it a minute there, Mr. Hill. Solicitor, on second thought, it would be your responsibility to proceed.
>
> (Sol.) *Schmutz*: Yes sir. I was going to proceed. . . .
>
> Court: This is—the motion we are taking up now is to suppress any confession oral or written that was taken from this defendant. It would be incumbent on you to establish the admissibility of that.
>
> Mr. Schmutz: Yes sir.
>
> Mr. Hill: Your honor, I take the position that it is our duty to go first but, of course, I will sit down and yield to the state.
>
> Court: I think you will want him to go first.
>
> Mr. Hill: All right.
> (Tr. p. 39, l. 9-p. 40, l. 5).

The Applicant presently contends that this reveals inadequate legal preparation because competent counsel should know that the State had the burden of proof.

This Court, based on the entire record, finds that the Applicant's present interpretation is not accurate. This Court finds, based upon counsel's testimony in this hearing, that counsel was aware that it was incumbent on the State to show that the alleged confession was given under the mandates of the Constitution. This Court further

finds that counsel desired to go forward on this issue as a matter of trial tactics because he was of the informed opinion, based upon his understanding of the totality of circumstances surrounding the confession that it would be more effective and persuasive. This Court cannot find any constitutional deficiency in his strategy. Nevertheless, inasmuch as the State did proceed first with the burden properly established there is *no prejudice* with this strategy because there is *no showing* that it worked to his actual disadvantage. *Martin v. Maggio*, 711 F.2d 1273 (5th Cir. 1983).

In allegation I(i), the Applicant now contends that counsel failed to prepare him properly for his *in camera* testimony on the admissibility of the confession and that counsel erred in not presenting the Applicant's testimony on this issue in front of a jury. A review of the record of the Applicant's *in camera* testimony reveals that Butler testified about the arrest for assault and battery on August 30, 1980, after which he was taken to the jail around 10:30-11:00 P.M. (Tr. p. 95). He testified that he was awakened the next morning at 7, but was not able to sleep on August 30-31, 1980. He further testified that counsel Hill did not tell him not to talk with police about the charge during his representation in a bond hearing. (Tr. p. 96). He testified about the questioning and that Frasier cussed at him and hit him. (Tr. pp. 98-99). He testified that he did not know why he signed the statement and that he did not kill the girl. (Tr. pp. 99-101). This Court finds that counsel spent numerous time investigating and researching the confession issue. The matter of the confession was further developed in the preliminary hearing on September 22, 1980, which counsel transcribed and reviewed prior to the trial. Counsel also met with the Applicant prior to the trial and discussed the case, including the confession. The Applicant has failed to establish where counsel failed in his preparation of the Applicant to

testify in the *in camera* hearing that prejudiced the Applicant's trial. His allegation, in light of the entire record, must be dismissed.

The Applicant also alleges that he desired to testify in the guilt stage in front of the jury about the circumstances of his statement. During the trial, the trial court made inquiry of the Applicant about the decision not to testify. (Tr. pp. 871-877). During the inquiry, the Applicant testified that he agreed with his lawyer's strategy not to have him testify, understanding the advantages and disadvantages. (Tr. pp. 871-872, 874-875). His statements in open court carry a presumption of verity which the Applicant has wholly failed to rebut in this proceeding. *Blackledge v. Allison*, 431 U.S. 63 (1977). This Court finds that counsel made an informed decision not to call the Applicant in the guilt phase to testify. Counsel's tactical decision was based upon the Applicant's version of the facts, the effect of the reply testimony that Margo Brown, his ex-girlfriend, could give and the ramifications of cross-examination by the Solicitor. This Court, in hindsight, cannot find counsel performed outside of the standard of competence in not urging the Applicant to testify. His allegation must be denied.

In allegations I(j and k), the Applicant asserts that counsel should have recused himself and testified about alleged instructions to the police not to question Applicant. The trial court, after a suppression hearing, allowed for the introduction of the statements. (Tr. pp. 124-126). His allegation was specifically refuted during the trial by the police officers who testified that counsel did not tell them not to talk with the Applicant. *See*: Tr. pp. 88, 96, 113. Butler himself testified during the original trial that he did not hear Hill tell him not to talk with the police, although he recanted this statement in the post conviction proceeding. *Compare*: Tr. p. 96. This Court is constrained from a review of the entire record to find as a fact that counsel did not request the

police on August 31, 1980, not to discuss any matter with the Applicant. The Applicant has failed in his burden of proof before this Court. Therefore, the allegation lacks factual merit and there was no prejudice by counsel's not testifying about any alleged instructions to the police. This Court further finds that there was no agreement between counsel Hill and the law enforcement officers that they would not question Horace Butler on this or any other matter. This factually differs from the coercive setting in *Brewer v. Williams*, 430 U.S. 387 (1977), where an agreement was entered into and apparently broken. *Cf.*, *Williams v. Nix*, 700 F.2d 1164, 1172 (8th Cir. 1983). Furthermore, this Court agrees with the findings of Judge Harris that the statements were freely and voluntarily given with a full understanding of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) and an intelligent waiver of his right to counsel. (Tr. pp. 124-126). The allegations of the Applicant that he was not read his *Miranda* rights, but the police advised him not to call his attorney, and that he did not know what he was signing when he signed the confessions are specifically rejected by this Court as lacking a factual basis.

The final guilt phase ineffective assistance allegation concerns counsel's failure to place into evidence testimony about an alleged alibi. Counsel investigated, prior to trial, the alleged alibi defense. He discussed the case with Willie Smalls who said he was with Butler at Duffy's and called to tell him it was not true. No one else was available to testify about any alleged alibi based upon counsel's investigation and consideration of Sammy Lee Butler, Herman L. Porter, and Ann Butler and the possibility of placing Butler on the witness stand to testify about his alleged alibi was previously resolved. This Court, based upon the testimony presented, finds that counsel's decision not to call these witnesses was the product of informed deliberation.

b.

Punishment Phase Issues

This Court finds that counsel performed within the standards of competence demanded of attorneys in his preparation and presentation during the sentencing phase of the trial. Counsel was aware of the possible statutory aggravating and mitigating circumstances of the death penalty act based upon his review prior to and during the trial. The Applicant thinks more should have been done to present into the record the Applicant's alleged "worthy life." Counsel was aware that he could present a broad arrary of mitigation testimony, but made the informed decision not to call his friends because Larry White, the State's witness, was his best friend and other witnesses would have shown his familiarity with the scene of the incident to bolster the State's guilt showing that could affect a jury and create a negative factor instead of a positive effect. Counsel also feared the potential effect of Margo Brown who might reveal damaging testimony. Counsel discussed these matters and his reasons for not calling family members with the Applicant and his family and his presentation does not fall outside the standard of competence.

Counsel also prepared the Applicant for his unsworn statement to the jury. The allegation is without merit and must be denied and dismissed. (Tr. pp. 1016-1021).

This Court further finds that counsel did not constitutionally err in failing to have a psychiatric or psychological evaluation of the Applicant for use in the penalty phase. Counsel presented the testimony of Isaiah Fraiser who testified about the lack of education by the Applicant. During this hearing, the Applicant presented some psychological testimony that placed the Applicant in a borderline retardate range. This Court finds that there was no error in counsel's failure to pursue or present this testimony. The statutory mitigating circumstances

were instructed to the jury and supplied to them in writing. (Tr. pp. 1000, 1120). Frasier's testimony revealed the limited educational experience of the Applicant. The present position in hindsight fails to reveal any evidence that could have had an impact on the jury. The allegation must be dismissed.

In allegation VIII, the Applicant contends that counsel was not qualified to represent the Applicant in a death penalty case. This Court finds that counsel Hill graduated from Law School in 1974 and became a member of the Bar shortly thereafter. He worked with the South Carolina Court Administration in teaching magistrates about their duties and also worked as a magistrate in Ravenel. As a member of the Bar, he possessed the necessary qualifications to handle this matter to which he was retained. He had previously represented the Applicant and developed a meaningful attorney-client relationship to handle this case. Counsel was familiar with the area, the background of the Applicant and his family, and the difficult position he was in to defend an individual charged with a serious crime. While this was his first murder case, counsel prepared himself by reviewing the law in the area and contacting other lawyers more familiar in the area for their advice. The trial court did not err in allowing counsel to represent the Applicant in this case. Simply because it was this lawyer's first death penalty case does not disqualify him from handling the matter. Each attorney who handles these cases must sometime have a first case. The Applicant's allegation fails to set out any claim for relief and must be dismissed. Counsel Hill was adequately qualified and able to represent a crime of this seriousness. The record, in its totality, before this Court reflects that counsel performed his duties seriously and zealously in regard to his client's interest recognizing the impact and consequences of each decision he made. The Applicant received the effective assistance of counsel

as required by the United States Constitution and South Carolina law. His allegations to the contrary must be denied and dismissed.

IV.

SENTENCING PHASE EVIDENCE-

In allegation III, the Applicant is apparently contending that the trial court erroneously allowed the evidence admitted during the guilt phase to be introduced during the sentencing phase. The record reflects that the State relied on its guilt phase evidence for the punishment phase. (Tr. pp. 1002-1003). This was done without objection. This is proper under the South Carolina death penalty statute and procedure where the same jury hears both phases of the trial. His allegation fails to state any claim for relief and is wholly frivolous. The allegation must be dismissed.

V.

REASONABLE DOUBT INSTRUCTION

In his allegation IV, the Applicant contends that the trial court erred in its instruction to the jury on reasonable doubt when it equated it with a substantial doubt. (Tr. pp. 940, 1022, 1026). This matter was raised and denied on the direct appeal by the State Supreme Court. *State v. Butler*, 290 S.E.2d 1, 4 (1982). Post conviction relief is not a substitute for direct appeal where matters that have already been raised can be reasserted. *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975). The allegation is without merit as a matter of South Carolina law.

VI.

INSTRUCTION ON RAPE

In allegation V, the Applicant contends that the court erred by giving the instruction on the common law definition of rape as opposed to the statutory definition of criminal sexual conduct. South Carolina law has an

aggravating circumstance murder committed while in commission of the crime of rape. Section 16-3-20(C)(a)(1)(a), CODE OF LAWS (1976). The instruction on rape was given without objection from counsel. The Supreme Court recently held that "it was the intent of the legislature that these terms [rape and criminal sexual conduct] be interchangeable." *State v. Edward Lee Elmore*, Opinion No. 21996, filed November 1, 1983. In addition to not being properly presented before this Court under *Simmons, supra*, the allegation lacks legal merit as a matter of South Carolina law. The allegation is without merit.

VII.

INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE

In allegation VI, the Applicant contends that it was error for the trial court to refuse to instruct on the law of circumstantial evidence. The record reveals that counsel requested such an instruction as his request No. 4. (Tr. pp. 883-884). The trial court denied his request. (Tr. p. 884, l. 9). The matter was raised on appeal by his Exception 8. The Supreme Court, in its *in favorem vitae* review stated they had "carefully reviewed the entire record for any prejudicial error and find none." This matter cannot be reasserted in these proceedings which are not a substitute for an appeal. *Simmons, supra.* The allegation is dismissed.

VIII.

ADMISSION OF THE CONFESSION

In allegation VII, the Applicant contends that his confession was improperly introduced. This issue has been substantially disposed of in the ineffective assistance of counsel claim. As presented in this allegation, this Court lacks jurisdiction based upon the Supreme Court's mandate in *Simmons v. State, supra.* For the reasons set out previously. this allegation is without merit and is dismissed.

IX.

CONCLUSION

This Court finds that the Applicant has wholly failed in his burden of proof of showing that he is entitled to post conviction relief from his conviction and sentence. This Court has thoroughly reviewed the entire record and the arguments of counsel for the Applicant and must find that the Applicant for Post Conviction Relief is without merit.

AND IT IS SO ORDERED this 28 day of January, 1984.

/s/ Richard E. Fields
RICHARD E. FIELDS
Judge
Ninth Judicial Circuit

Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C/A No. 86-1093-3

HORACE BUTLER,
Petitioner,

vs.

JAMES AIKEN, Warden, Central Correctional Institution,
and TRAVIS MEDLOCK, Attorney General,
State of South Carolina,
Respondents.

ORDER

June 9, 1987

This matter is before the Court for review of the Magistrate's Report made in accordance with 28 *U.S.C.* § 636(b)(1)(B) and the Order of the District Court filed May 9, 1987.

The Magistrate makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261 (1976). The Court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection is made, and the Court may accept, reject or modify, in whole or in part, the recommendation of the Magistrate, or recommit the matter to him with instructions. 28 *U.S.C.* § 636(b)(1).

BACKGROUND

Petitioner is incarcerated by the South Carolina Department of Corrections at the Central Correctional Institute, awaiting execution for the crime of murder. He was indicted in October 1980 in Charleston County. After timely notice that the circuit solicitor intended to seek the death penalty, the petitioner was tried on January 19, 1981 before The Honorable C. Anthony Harris. A verdict of guilty was returned on January 24, 1981. On January 26, 1981 the jury further recommended imposition of the death penalty after finding the murder was committed while in commission of the crime of rape.

Petitioner filed an appeal of his conviction and sentence, but these were affirmed by the South Carolina Supreme Court on February 22, 1982. *State v. Butler*, 277 S.C. 452, 290 S.E.2d 1 (1982). Petitioner then filed a petition for writ of certiorari to the United States Supreme Court, which was denied on October 12, 1982. *Butler v. South Carolina*, 459 U.S. 932 (1982).

Petitioner next filed an application for post-conviction relief. A hearing was held April 1, 1983 before The Honorable Richard E. Fields. On January 28, 1984 the petition was denied. An appeal of this denial was filed with the South Carolina Supreme Court, but the appeal was denied August 27, 1985. Petitioner then filed another petition for certiorari before the United States Supreme Court, which was denied. *Butler v. South Carolina*, No. 85-5926, filed January 26, 1986.

Petitioner filed a petition for writ of habeas corpus under 28 *U.S.C.* § 2254 on May 2, 1986 alleging numerous violations of his constitutional rights. He is currently represented by Dale Cobb, Esquire, of Charleston. Respondents filed a motion for summary judgment on June 13, 1986. The Magistrate's Report and Recommendation was filed March 9, 1987. In his Report, the Magistrate recommended that respondents' motion for summary

judgment be granted. Petitioner filed Objections to this Report April 10, 1987.

Respondents submit that petitioner has apparently exhausted all state remedies available and respondents unconditionally waive the defense of exhaustion as to all issues presented in the petition.

FACTS

The victim was Pamela Lane, an eighteen year old white female. At the time of her death, Lane was working as a clerk at Dodge's, a small convenience store on Highway 17, south of Charleston. On July 17, 1980 Lane worked the afternoon and evening shift. During her shift, her sister and brother-in-law delivered a new Moped to the store for Lane to ride home on. At 10:00 p.m. Lane and another employee closed the store and prepared to leave. Lane had some difficulty starting the Moped and called her sister several times. After the last telephone call at about 10:30 p.m., she successfully started the Moped and left the store. The other employee told Lane's sister that Lane was "on her way." Lane was last seen alive heading south on Highway 17 on her new Moped.

Early the next morning Lane's sister reported her disappearance. A few hours later several people fishing from a bridge discovered a body and reported it to the police, who determined it was the body of Pamela Lane. She had been shot once in the chest by a small caliber gun. The following day the minister of a local church discovered a Moped partially submerged in the pond behind his church. After seeing news reports on the death of Pamela Lane, he contacted authorities. The Moped was identified as the one Pamela Lane was riding when last seen.

Six weeks later, on August 30, 1980, Horace Butler was arrested on an unrelated charge and placed in the Charleston County Jail. He retained a local attorney,

W. McAlister Hill, who appeared with him at a bond hearing late Sunday evening, August 31, that same day, but was unable to make bond and remained in jail. In the early morning of September 1, 1980 at 12:50 a.m., Butler was removed from his cell and transported to the Charleston County Police Department. From that time until approximately 5:45 a.m., he was interrogated about the murder of Pamela Lane. During this period Butler made two confessions and signed two "waiver of rights" forms.[1] He apparently did not request his attorney's presence at any time.

In his first confession Butler claimed a friend, named Larry White, had killed Lane and then sought Butler's help in disposing of the Moped. After reciting this version, one of the police officers present told Butler he did not believe the story because there were too many inconsistencies and because Larry White had already talked to them. Butler then signed the second waiver form and confessed to the murder of Pamela Lane. According to the second confession, Butler saw Lane on her Moped and followed her. When he blinked his lights at her she pulled off the road, hid the Moped in some bushes and got in his car. After driving to a wooded area, he claims she suggested sex and began removing her clothes. After the alleged consensual sex, as she was redressing, he claims she said she was going to be late getting home and would cry rape. Butler stated that he panicked and shot her, then dumped her body off the bridge where it was found. He claims he then found Larry White who helped him dispose of the Moped.

After making the second confession, petitioner took police to the area where these events occurred and identified the actual scenes where he met the victim, had sexual relations with her and killed her.

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[1] A form waiving the rights guaranteed an accused under *Miranda v. Arizona*, 384 U.S. 436 (1966).

ISSUES

The issues presented in petitioner's Objections are:

1. Ineffective assistance of counsel.

2. Denial of petitioner's Sixth and Fourteenth Amendment rights to a jury selected from a representative cross section of the community.

3. Denial of petitioner's Sixth, Eighth and Fourteenth Amendment rights to a fair and impartial jury by qualifying a juror who could not vote for a life sentence.

4. Denial of petitioner's Fifth and Fourteenth Amendment rights to due process by allowing evidence of unrelated prior crimes.

5. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by permitting statements to be introduced in violation of South Carolina's copy rule (*S.C. Code* §§ 8-15-50, 19-1-80 and 19-1-90).

6. Denial of petitioner's Fifth and Fourteenth Amendment rights to due process by failing to instruct the jury that voluntary manslaughter was a possible verdict.

7. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights to be informed of the charges against him because the state never indicted him for rape.

8. Denial of petitioner's Fourteenth Amendment rights not to be convicted except upon evidence sufficient to convince a rational trier of fact of his guilt beyond a reasonable doubt.

9. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by use of an impermissible definition for the term reasonable doubt.

10. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by the trial judge's failure to instruct the jury about the consequences of a non-unanimous recommendation of sentence.

11. Denial of petitioner's Eighth Amendment right to an appropriate review of his death sentence.

12. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by the impermissible jury instruction presuming malice from the use of a deadly weapon.

13. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by virtue of the trial judge's charging the definition of rape in lieu of the definition of criminal sexual conduct during the sentencing phase of petitioner's trial.

14. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by the trial judge refusing to charge circumstantial evidence.

15. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by failure of the trial judge to rule on the petitioner's claims that the statement(s) taken from him were not the product of a free and voluntary waiver.

DISCUSSION

1. INEFFECTIVE ASSISTANCE OF COUNSEL.

Horace Butler was represented by William McAlister Hill. Mr. Hill testified that he had been practicing law in South Carolina since 1974 and that prior to that time he was a state magistrate for four and a half years.

Mr. Hill testified that he was initially retained to represent Butler on an unrelated charge on August 31, 1980. He had previously represented Butler in a workman's compensation case and he had known Butler's father and family for a number of years.

Petitioner contends that he was denied the effective assistance of counsel both at the guilt phase of his trial and at the sentencing phase. Specifically in his Objections, petitioner has listed seven different areas in which he contends his trial counsel was ineffective.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court gave specific guidance for evaluation of ineffective assistance of counsel claims:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that tenders the result unreliable.

466 U.S. at 687.

The two components of a claim for ineffective assistance of counsel are commonly called error and prejudice. To demonstrate error, the "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 689. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Turner v. Bass*, 753 F.2d 352 (4th Cir. 1985). Furthermore, prejudice to the defense must be present for reversal. *Strickland* requires that

> [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. at 694; *Briley v. Bass*, 750 F.2d 1238 at 1247 (4th Cir. 1984).

Strickland noted other areas for courts to be sensitive to in its review of these claims. The Court emphasized that "*judicial scrutiny of counsel's performance must be highly deferential*" and that "a court must indulge a *strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,*" viewing the case as of the time of counsel's conduct rather than in hindsight, and recognizing counsel's discretion in the shaping of trial strategy. 466 U.S. at 689-690.

A. *Counsel failed to object to highly prejudicial testimony regarding the petitioner's propensity "to carry a pistol."*

At trial the prosecution posed the following question to Larry White:

Q: Was he [petitioner] known to carry a pistol? The witness responded affirmatively.

Petitioner contends that failure to object to this question constitutes ineffective assistance of counsel. The South Carolina Supreme Court considered this issue on direct appeal. That court concluded that there was "no error" in the admission of the testimony since it was merely cumulative. Therefore, the admission of this testimony fails to meet the prejudice prong of the *Strickland* test.

B. *Failing to display even the rudimentary knowledge of how to proceed with a Jackson v. Denno hearing.*

The main contention petitioner advances in this argument is Mr. Hill's alleged unfamiliarity with the proper procedure in the suppression hearing. The record reveals that Mr. Hill was prepared to proceed initially at the hearing rather than waiting for the state to proceed, as is customary in such hearings.

In its consideration of this issue the South Carolina Supreme Court concluded that Mr. Hill desired to proceed first as a matter of trial tactics based upon an informed opinion and his understanding of the totality of the circumstances surrounding the confession. The *Strickland* test mandates that this Court recognize counsel's discretion in the shaping of trial strategy. Nevertheless, inasmuch as the state proceeded first in presenting its case in the hearing, there could be no prejudice arising from Mr. Hill's intended strategy.

C. *Failure of counsel to recuse himself and testify at the Jackson v. Denno hearing.*

Petitioner contends that only Mr. Hill knew that he had warned the police not to talk to the Petitioner. At trial the police officers specifically denied that counsel told them not to talk to the petitioner. (See Tr. pp. 88, 96, 113).

Nevertheless, the objection is without merit. Any instruction to the police not to talk to the petitioner could not have related to the murder charge. At the time of the alleged instruction none of the individuals knew that the petitioner was a suspect in the murder investigation.

Petitioner's Sixth Amendment right to counsel had not yet attached as to the murder charge. *Maine v. Moulton*, —— U.S. ——, 106 S.Ct. 477 (1985). Furthermore, *Miranda* is designed to protect the *suspect's* Fifth Amendment rights. It will not be extended to attorney's communications to the police concerning his client. *Moran v. Burbine*, —— U.S. ——, 106 S.Ct. 1135 (1986).

Therefore, the failure of counsel to recuse himself and testify about the warnings did not deprive the petitioner of any constitutional protections. Nor is any prejudice to his case apparent from this omission.

D. *Failure to investigate, prepare and present alibi witnesses.*

Petitioner claims that trial counsel failed to make a sufficient preliminary investigation into the possibility of presenting an alibi defense. Mr. Hill testified that he made a full investigation as to all possible alibi witnesses for the petitioner. (App. at 287, *et seq.*). Therefore, this ground for relief is patently meritless under *Strickland.*

E. *Failure to specifically interview Margo Brown.*

The error complained of in this assertion is that counsel failed to interview Ms. Brown, a potential State's witness. Mr. Hill testified that he had extensive knowledge of the relationship between Ms. Brown and the petitioner. He had in fact defended the petitioner in an action brought by Ms. Brown arising from his allegedly "threatening to throw her baby in the fire." (App. at 291). Mr. Hill was acutely aware of her "deep hatred for Horace."

In light of counsel's familiarity with Ms. Brown and her failure to testify, this Court cannot discern any prejudice to petitioner's case resulting from failure to interview Ms. Brown; nor has petitioner demonstrated any such prejudice.

F. *Counsel failed to prepare or present mitigating testimony despite his avowed knowledge that it was available.*

Although Mr. Hill did not present any mitigation testimony, the record is replete with testimony regarding his consideration of mitigation witnesses, his discussions with the petitioner regarding these witnesses and his reasons for not calling each of the witnesses considered. (See App. pp. 66-74, 161-172, 192-199, 289-290, 314-315, 350-358, 423). Mr. Hill adequately explained his decision not to use these witnesses from a strategical point

of view. *Marzullo v. Maryland,* 561 F.2d 540 (4th Cir. 1977). Petitioner has failed to prove that his tactics were unreasonable under prevailing professional standards or that the presentation of such evidence would have rendered a more favorable sentence.

G. *Failure to have petitioner psychiatrically evaluated for the sentencing phase of the trial.*

At the trial Mr. Hill presented the testimony of the petitioner's elementary school principal, Mr. Isiah Frazier. Mr. Frazier testified as to the petitioner's poor academic record and that he left school at age sixteen while he was in the fourth grade. (Tr. pp. 1004-1008).

During the post-conviction hearing petitioner presented the testimony of Dr. John Roitzsh, a clinical psychologist. This testimony indicated that petitioner tested as a borderline mental retardate. (App. pp. 152, 156).

Like the state court, this Court finds that the failure to present psychological evaluations does not rise to the level of ineffective assistance of counsel. Although such evidence may have been beneficial, it would not have revealed any additional mitigating evidence. The testimony of Mr. Frazier, if believed, was sufficient to reveal the message contained in the psychiatric evaluation, i.e., that petitioner was impaired by a lack of education and low intelligence level. The absence of the psychiatric evaluation did not prejudice petitioner's defense.

2. DENIAL OF PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A JURY SELECTED FROM A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY.

Petitioner asserts that the jury for his trial was improperly selected, in that eight potential jurors were excluded because they opposed the death penalty, thus denying petitioner a jury which fairly represented a cross section of the community. The jury as it was eventually empanelled contained nine whites and three blacks; and

there were two alternates (one white, one black). Petitioner has argued that these jurors were not a representative cross section of the community because no person unalterably opposed to the death penalty served on the jury.

In the recent case of *Lockhart v. McCree*, 476 U.S. ——, 90 L.Ed.2d 137 (1986), the Court concluded that jurors who are unalterably opposed to the death penalty may be excluded from serving during the penalty phase. Furthermore, their exclusion from the guilt phase does not infringe on a defendant's right to an impartial jury. The Court reiterated in *Lockhart* that defendant is not entitled to a jury which statistically mirror the make-up of a community, but only to a jury from which members of a "distinctive group" have not been systematically excluded. *See also Batson v. Kentucky*, 476 U.S. ——, 90 L.Ed.2d 69 (1986). Although the *Lockhart* majority stopped short of defining "distinctive group," the opinion does indicate that individuals who could not under any circumstances render a capital sentence (a.k.a. "Witherspoon excludables") do not constitute such a "distinctive group" for cross section purposes. 106 S.Ct. at 1765.

Therefore, petitioner's Sixth and Fourteenth Amendment rights to a jury selected from a representative cross section of the community have not been violated by the exclusion of jurors who could not recommend a capital sentence.

3. DENIAL OF PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL JURY, BY QUALIFYING A JUROR WHO COULD NOT VOTE FOR A LIFE SENTENCE.

Petitioner next alleges that one juror, Jennings B. Knight, should have been excluded for cause based on his belief that the death penalty is warranted in all cases of murder. The trial judge questioned Mr. Knight about

his ability to apply the law as it was charged. After considering the responses to these questions the trial judge was satisfied that Mr. Knight was properly qualified to sit as a juror.

In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Court indicated that a juror may not be excluded for cause unless his views on capital punishment would prevent him from performing his duties as a juror in accordance with his instructions and his oath. In reviewing the qualification of a juror the trial judge's factual finding of the juror's capacity is the determinative inquiry.

Under 28 *U.S.C.* § 2254(d) federal courts must accord a presumption of correctness to state court findings of fact. The statute provides that "a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction . . . shall be presumed to be correct."

Petitioner has failed to offer any evidence which undermines the § 2254(d) presumption on this issue. Based on the record and the trial judge's satisfaction with Mr. Knight's responses, this Court concludes that he was properly qualified as a juror.

4. DENIAL OF PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS BY ALLOWING EVIDENCE OF UNRELATED PRIOR CRIMES.

Petitioner next asserts that the trial judge allowed a prosecution witness, Larry White, to testify about matters which improperly attacked petitioner's character and connected petitioner to prior crimes. The testimony giving rise to this objection was elicited by the prosecutor when he asked whether the petitioner "was known to carry a pistol?" There was no objection to the question or the witness' affirmative response.

The South Carolina Supreme Court addressed this issue and concluded that admission of the testimony constituted no error as a matter of state law.

Absent "circumstances impugning fundamental fairness or infringing specific constitutional protections," admissibility of evidence does not present a federal question. *Grundler v. North Carolina*, 283 F.2d 798, 802 (4th Cir. 1960). This Court discerns no such unfairness or constitutional infringement in the admission of this evidence.

5. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY PERMITTING STATEMENTS TO BE INTRODUCED IN VIOLATION OF SOUTH CAROLINA'S COPY RULE (*S. C. CODE* §§ 8-15-50, 19-1-80 AND 19-1-90).

Under South Carolina law, a person who makes a "statement," particularly a witness in a criminal proceeding, must be given a copy of the statement at the time it is made. *S. C. Code* §§ 8-15-50 and 19-1-80, 90 (1976). Petitioner signed a confession on September 1, 1980 but was not given a copy until September 22, 1980. The trial judge nonetheless allowed the confession to be admitted at trial over objection of counsel. The South Carolina Supreme Court agreed and construed the statutes to mean that the witness (or here, the petitioner) must be allowed ample opportunity to review the statement and, if desired, to refute the statement. They found that the purpose of the rule had been fulfilled since petitioner had nearly four months to review the statement before his trial.

A decision on state law by a state court is entitled to be given great weight and where they do not infringe on specific constitutional protections, violations of state law are not cognizable under 28 *U.S.C.* § 2254. *Chance v. Garrison*, 537 F.2d 1212 (4th Cir. 1976) (citing *Grundler, supra*).

6. DENIAL OF PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS BY FAILING TO INSTRUCT THE JURY THAT VOLUNTARY MANSLAUGHTER WAS A POSSIBLE VERDICT.

Despite requests from the petitioner the trial judge refused to charge manslaughter as a possible verdict. At trial counsel argued that the victim's alleged threat to accuse the petitioner of rape was sufficient provocation to justify instruction on the lesser offense. The South Carolina Supreme Court, like the trial judge, disagreed, specifically finding no "legal provocation" in these circumstances which would warrant an instruction as to mansalughter.

The elements of a crime are defined by state law. Specifically, *S.C. Code Ann.* § 16-3-10 (1976), defines the crime of murder. The elements of manslaughter are defined at *S. C. Code Ann.* § 16-3-50 (1976). This issue raises a question of proper jury instructions as a matter of state law. The case of *Grundler v. South Carolina, supra*, specifically addresses federal review of jury instructions. Even if this Court disagreed with the trial judge's ruling or the state court's interpretation of the law, the issue is immune from federal scrutiny absent limited circumstances not present herein.

Petitioner's attempt to transform this state law issue into a due process violation is unpersuasive. Refusal to charge manslaughter resulted in no fundamental unfairness nor in any abrogation of a constitutional protection.

7. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO BE INFORMED OF THE CHARGES AGAINST HIM.

Petitioner argues that he was "held to answer" for the crime of rape without first being indicted, in violation of Article I, Section 11 of the South Carolina Constitu-

tion. The question presented here is whether a person properly charged with capital murder must be indicted for the aggravating circumstances brought out during the trial.

The South Carolina Supreme Court is responsible for interpretations of state law, unless and until those laws infringe on constitutionally protected rights of the individual *Grundler v. North Carolina, supra.* The petitioner was not "held to answer" for the separate crime of rape, even though the evidence of rape affected the severity of his punishment. The circumstances which increased the severity of his punishment had to be proven beyond a reasonable doubt. The state met the constitutionally dictated burden of proof on every element of the murder charge and the aggravating circumstances.

8. DENIAL OF PETITIONER'S FOURTEENTH AMENDMENT RIGHTS NOT TO BE CONVICTED EXCEPT UPON EVIDENCE SUFFICIENT TO CONVINCE A RATIONAL TRIER OF FACT OF HIS GUILT BEYOND A REASONABLE DOUBT.

Petitioner alleges that his sentence should be reversed because the evidence does not support a finding that he committed a rape. In his brief petitioner set forth the five factors in evidence which tended to prove rape and four factors in evidence which tended to disprove rape.

The South Carolina Supreme Court found the evidence sufficient to create a question for the jury. It is a well-settled principle of law in this state that the "trial court is concerned only with the existence of evidence, not its weight." *State v. Butler*, 277 S.C. 452, 290 S.E.2d 1, at 4 (1982). "*Any* evidence direct or circumstantial reasonably tending to prove the guilt of the accused creates a jury issue." (emphasis added). *State v. Butler*, 290 S.E.2d 1, at 4. Therefore, the five pieces of evidence which tended to prove rape created a jury issue and provided a basis on which a rational factfinder could have

arrived at an opinion that, beyond a reasonable doubt, petitioner committed rape. The standard applied by a federal habeas corpus court in determining the sufficiency of the evidence neither permits a court to make its own subjective determination of guilt or innocence, nor requires scrutiny of the reasoning process actually used by the factfinder. *Jackson v. Virginia*, 443 U.S. 307 at fn. 13 (1979). Sufficient evidence existed in the record that the case should have been submitted to the jury on the aggravating circumstances of rape. There has been no constitutional infringement in this regard.

9. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY USE OF AN IMPERMISSIBLE DEFINITION FOR THE TERM REASONABLE DOUBT.

Unlike jury instructions which are based on state law, instructions as to reasonable doubt may rise to the level of constitutional concern. All criminal defendants are considered innocent until proven guilty *beyond a reasonable doubt*, a basic tenet of the due process guaranteed all people by the Fifth and Fourteenth Amendments. The Supreme Court has never specifically considered the propriety of instructions which define reasonable doubt, although it has noted that the attempt to define "reasonable doubt" has been criticized. See *Taylor v. Kentucky*, 436 U.S. 478, 488 (1978), and cites therein. The consensus among courts is that "reasonable doubt" is a phrase generally understood by laymen, which needs no further definition.

The judge in the instant case defined reasonable doubt three times. During the guilt phase, he instructed the jury that it was

> . . . a doubt for which you have a real reason, not a frivolous doubt, not a whimsical, fanciful doubt, because you can doubt any proposition if you wanted to, but a reasonable doubt is a substantial doubt

> for which an honest person seeking the truth can give a real reason. (Tr. 940, line 24-941, line 3).

During the sentencing phase, he redefined reasonable doubt using the same language. (Tr. 1002, lines 12-16). After instructing the jury as to circumstantial evidence, the trial judge again defined reasonable doubt in the following manner:

> The two phrases "beyond a reasonable doubt" and "proof to a moral certainty" are basically synonymous and they are the legal equivalent of each other. These phrases, however, connote a degree of proof which is distinguished from an absolute certainty. Proof beyond a reasonable doubt, which the law in its mercy requires for the benefit of the accused, is not a weak or slight doubt, but it is a serious or strong or substantial well-founded doubt as to the truth of the matters asserted by the state. (Tr. 1026-1027).

Petitioner accurately asserts that several courts have overturned convictions where a trial judge has defined reasonable doubt in such a manner that the defendant's burden of proof was increased. *Smith v. State*, 247 S.E.2d 925 (Tenn. 1977); and *State v. Davis*, 482 S.W.2d 486 (Mo. 1972). Those cases disapproved instructions which equated reasonable doubt with "substantial" doubt. The Fourth Circuit Court of Appeals has considered this issue in *Smith v. Bordenkircher*, 718 F.2d 1273, *cert. denied*, 104 S. Ct. 2355 (1983); and in *Murphy v. Holland*, 776 F.2d 470 (4th Cir. 1985). In both cases, that court agreed that the instructions were ill-advised, but declined to overturn the convictions. The instructions given in *Murphy* are similar to those used here, but the Court upheld their use. In essence, although the federal courts may deplore the attempts to define reasonable doubt, that assertion alone is not sufficient to warrant granting the writ of habeas corpus.

10. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY THE TRIAL JUDGE'S FAILURE TO INSTRUCT THE JURY ABOUT THE CONSEQUENCES OF A NON-UNANIMOUS RECOMMENDATION OF SENTENCE.

The jury was told by the trial court that a recommendation of either the death penalty or of life imprisonment must be made by a unanimous verdict of the jury. Under South Carolina law, only the recommendation of the death penalty need be unanimous. *S. C. Code Ann.* § 16-3-20(c) (1976, as amended). Petitioner contends this incorrect instruction undermined the reliability of the sentencing proceeding required by *Woodson v. North Carolina*, 428 U.S. 280, at 303 (1976), because the instruction injected an arbitrary element into the jury deliberations.

After the sentencing verdict was returned, the jury was polled by the trial judge. All the jurors indicated that they agreed with and voted for the death penalty. This Court is unable to discern any prejudice resulting from the trial judge's failure to more fully instruct the jury on the consequences of their deliberations procedure. Habeas relief will not be granted based on speculative injury only.

11. DENIAL OF PETITIONER'S EIGHTH AMENDMENT RIGHTS TO AN APPROPRIATE REVIEW OF HIS DEATH SENTENCE.

S.C. Code Ann. § 16-3-25(c)(3) requires the South Carolina Supreme Court to review every death sentence and determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

In its proportionality reviews, the state supreme court has chosen to compare a given death penalty case only with other death penalty cases. Petitioner asserts that

his case should be compared with any case similar in circumstances, including those where the death penalty was not imposed.

"Although a comparative proportionality review may be a safeguard against arbitrarily imposed death sentences, it is not required under the Constitution." *Shaw v. Martin*, 733 F.2d 304, at 317 (4th Cir. 1984); *citing Pulley v. Harris*, 465 U.S. 37 (1984). Absent constitutional protections, the necessity and sufficiency of proportionality review remains a question of state law. *Shaw, supra.*

12. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY THE IMPERMISSIBLE JURY INSTRUCTION PRESUMING MALICE FROM THE USE OF A DEADLY WEAPON.

Petitioner argues that the judge's charge on malice impermissibly "presumed away" an element of the offense of murder when he charged:

> Malice may also be inferred or presumed from the use of a deadly weapon in the commission of the homicide. (Tr. 943).

Petitioner cites *Francis v. Franklin*, 471 U.S. 307 (1985), and *Sandstrom v. Montana*, 442 U.S. 510 (1979), in support of this exception. *Francis* speaks of three types of presumptions. The first type is a mandatory or irrebuttable presumption, where the fact is presumed if the state proves certain predicate facts. This presumption is unconstitutional because it totally removes the presumed element of the crime from the case. *Francis, supra*, at 355, n.5. The second type of presumption is a mandatory rebuttable presumption. These are usually considered unconstitutional because they shift the burden of proof to the defendant. A rebuttable presumption may be constitutional if it shifts only the burden of production to the defendant, not the burden of persuasion. *Sandstrom*, at 515. If the instruction could be interpreted by a reasonable juror as requiring the defendant to prove by any degree of proof that the element of the crime is not present, then the State has been relieved of its responsibility and the instruction is unconstitutional. *Sandstrom*, at 517.

The third type of presumption is called a "permissible inference," which may be constitutional because

> . . . it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proven. *Franklin*, at 353.

A permissive inference may still be unconstitutional if the conclusion would not be naturally drawn from the predicate facts. See *Ulster County Court v. Allen*, 442 U.S. 140, 157-163 (1979).

The Supreme Court in *Franklin, supra*, found that the jury there was instructed that the presumption could be rebutted, but held that this charge still had the effect of shifting the burden of proof to the defendant. *Franklin*, at 355.

The charge to which petitioner excepts is a permissive inference. It instructs the jury that if the crime was committed with a deadly weapon, the jury may infer, or presume, malice.

The *Francis* Court also instructs that "the potentially offending words must be considered in the context of the charge as a whole." 105 S.Ct. at 1971. Therefore, other portions of the charge must also be considered to determine if they mitigate the potential harmful impact of the suspect portion. The jury was also told

> I hasten to tell you that even if the facts proven in the case are such as to give rise to the inference or

> implication of malice, that implication is strictly rebuttable. (Tr. 943, lines 13-16).

At this point, the instructions would have read as mandatory rebuttable presumption. The trial judge continued, however, to water down the presumption.

> It is not binding on you ladies and gentlemen as a matter of law. And when all of the facts and circumstances surrounding the use of a deadly weapon in a homicide have been brought out and presented to a jury, the presumption itself vanishes and it then remains as it always does, your responsibility to make a determination under the facts and circumstances which have been proven to you: Did the defendant have malice . . . in his heart and in his mind at the time of the infliction of the fatal injury. (Tr. 943, lines 16-24).

The charge, taken as a whole, creates no more than a permissive inference allowed by *Ulster County Court v. Allen*, 442 U.S. 140 (1979).

13. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY VIRTUE OF THE TRIAL JUDGE'S CHARGING THE DEFINITION OF RAPE IN LIEU OF THE DEFINITION OF CRIMINAL SEXUAL CONDUCT DURING THE SENTENCING PHASE OF PETITIONER'S TRIAL.

In 1977 the rape statutes, *S.C. Code Ann.* §§ 16-3-630 to 16-3-650, were replaced by statutes which defined criminal sexual conduct. Petitioner was tried for murder in early 1981. At the time of petitioner's trial, the death penalty statute listed rape as an aggravating circumstance (*S.C. Code Ann.* § 16-3-20), but the rape statute had been replaced with one for criminal sexual conduct. Neither side here disputes that petitioner could

not have been charged with rape since the statute had been repealed. Petitioner here argues two things: first, that the trial court was without jurisdiction to use a repealed statute in determining his sentence; and second, that use of the rape statute relieved the state of its burden of proof on all elements of the offense.

At the time of the incident, the behavior in question was a crime under either statute (rape or criminal sexual conduct). Only the name of the crime had been changed. The South Carolina Supreme Court has determined that the legislature meant for the two terms, rape and criminal sexual conduct, to be used interchangeably. *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). Their interpretation of state law is not subject to review by federal court unless petitioner can demonstrate that his constitutional rights were violated by this interpretation. *Chance v. Garrison*, 537 F.2d 1212 (4th Cir. 1976).

In support of the above issue, petitioner asserts that substitution of the rape statute for that on criminal sexual conduct relieved the state of its burden of proving all elements of the crime.

Rape was defined as the carnal knowledge of a woman by force and without her consent. Criminal sexual conduct is defined as sexual battery accompanied by aggravated force. Petitioner has claimed that criminal sexual conduct requires the state to prove the additional element of aggravation.

A comparison of the two definitions confirms the state supreme court's conclusion that the two terms are synonymous. The State still had to prove the existence of an act of sexual intercourse, accompanied by some force either actual or threatened. Therefore, the State was not relieved of proving an element of criminal sexual conduct by the trial judge's charge of rape.

14. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY THE TRIAL JUDGE REFUSING TO CHARGE CIRCUMSTANTIAL EVIDENCE.

At the end of the guilt phase of the trial, the judge refused to charge the jury on circumstantial evidence. The petitioner argues that if the jury chose to disregard his confession as being involuntary, the only remaining evidence was circumstantial, thus necessitating the requested instruction.

Where the state relies upon direct evidence a trial judge may properly refuse to charge circumstantial evidence. *State v. White*, 272 S.C. 384, 252 S.E.2d 294 (1979).

At trial three witnesses, Larry White, Shirley Williams and Curtis Williams, all testified that the petitioner told them he had killed a girl on a Moped. Although their recital of events differed from petitioner's confession, their testimony represents direct evidence of the petitioner's culpability. Sufficient direct evidence was admitted to place the trial judge's refusal of the charge within the parameters of his discretion under South Carolina law.

Additionally, an instruction on circumstantial evidence is not constitutionally mandated where adequate instructions as to reasonable doubt have been given. *Holland v. United States*, 348 U.S. 121 (1954).

15. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY FAILURE OF THE TRIAL JUDGE TO RULE ON THE PETITIONER'S CLAIMS THAT THE STATEMENT TAKEN FROM HIM WAS NOT THE PRODUCT OF A FREE AND VOLUNTARY WAIVER.

Horace Butler was arrested the night of August 30, 1980 on an unrelated charge of assault and battery with intent to kill for an incident which occurred several

weeks earlier. (Tr. 34). That charge was later dismissed. (Tr. 118). The four officers who arrested him were the same four who were present when he confessed to the murder of Pamela Lane. Twenty-four hours later, at about 8:30 p.m. on August 31, he appeared with his attorney at a bond hearing on the unrelated assault charge. After the bond hearing, he was returned to the Charleston County Jail. Butler's attorney contends that after the bond hearing he told the officers not to question Horace (on the unrelated assault charge). The officers have stated that they do not remember such an instruction. Approximately four hours later, at 12:15 a.m. on September 1, 1980, he was taken from the jail to Charleston County Police Headquarters. Between 12:50 a.m. and 2:55 a.m., he was questioned about the death of Pamela Lane and made his first statement, in which he stated that Larry White killed Pamela Lane, but that he (Butler) helped hide the Moped. Between 2:55 a.m. and 5:45 a.m., Butler changed his first statement and confessed to the murder himself.

According to testimony given by police, Butler was never coerced or intimidated in any way. He was informed, however, that Larry White had already talked to the police. He was asked at the jail if he wanted to go to police headquarters. (Tr. 41). Prior to any interrogation the police informed Butler that they were charging him with the murder and kidnapping of Pamela Lane. (Tr. 42). They inquired whether Butler was sleepy and whether he was under the influence of any drugs or medication. (Tr. 42). The officers read him his *Miranda* rights and explained each of the individual rights sequentially. (Tr. 44). According to the police Butler indicated that he understood his rights. (Tr. 45). He signed two separate waivers of those rights during the course of the interrogation. (Tr. 44-45, 48 and 56). Two or three thirty minute breaks were provided throughout the five hour period during which the police and

petitioner consumed coffee, water and doughnuts. (Tr. 54 and 62). The officers testified that Butler was never alone with a single officer during the course of the interrogation. (Tr. 54 and 114). Throughout the conversations Butler was responsive to the officers' questions. (Tr. 70). After signing the second confession at 5:45 a.m., Butler indicated again that he was not tired and voluntarily led officers to the scenes where he intercepted the victim, where the sexual intercourse and shooting occurred and where he dumped the body. (Tr. 63). He was returned to the jail at about 10:30 a.m. on September 1, 1980.

Butler's version of the events varies considerably. He claims that when an officer arrived at the jail to pick him up, he was told he might be going home. (Tr. 97-98). After his arrival at police headquarters, he asserts the police abused him verbally and physically. He claims the officers threatened to arrest his whole family. (Tr. 100).[2]

After hearing testimony at the suppression hearing from Butler, the police officers involved, and Butler's former school principal, who testified about Butler's low intelligence level (Tr. 91-94), the trial judge made the following findings of fact (Tr. 122-123):

A. Defendant-petitioner was afforded his Fifth Amendment rights required by *Miranda*; and

B. The statements he gave were voluntary and admissible at trial.

Petitioner now asserts that his Fifth and Sixth Amendment rights to counsel were violated and raises three specific questions as to this issue:

A. Whether the right to counsel had attached;

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[2] Petitioner's father was arrested and charged with being an accessory after the fact, relating to Lane's murder, on September 1, 1980. (App. 30).

B. Whether petitioner effectively waived that right; and

C. Whether police conduct violated that right.

Those questions also require that we consider whether or not petitioner's confession was voluntary.

> [T]he ultimate question of whether, under the totality of the circumstances, a challenged confession was obtained in a manner compatible with the requirements of the Constitution to be a matter not entitled to a presumption of correctness under 28 *U.S.C.* § 2254(d) but rather a matter for independent federal determination. *Miller v. Fenton*, —— U.S. ——, 106 S. Ct. 445, 88 L.Ed.2d 405 (1985). In so holding the Court recognized that "subsidiary factual questions such as . . . whether in fact the police engaged in the intimidation tactics alleged by the defendant . . . are entitled to the § 2254(d) presumption." *Miller*, 106 S. Ct. at 451.

Frederick Wayne Thomas v. Nathan A. Rice, et al., Op. No. 85-7552, at p. 5 (4th Cir. 5/14/87).

A. Petitioner's Sixth Amendment Right to Counsel.

Despite contradictory versions of the events which occurred August 30 through September 1, 1980, several facts emerge uncontradicted. All of the events prior to midnight of August 31 (Butler's arrest, detention, retention of counsel, and bond hearing) apparently pertained only to the unrelated assault charge. All events occurring after midnight of August 31 (Butler's removal from jail, interrogation, and confession) related to the eventual murder charge. Attention apparently shifted to Butler because White was also in custody and had implicated Butler (Tr. 53), but the record is completely devoid of any indication as to *when* police attention focused on Butler. However, there is no evidence that there was any subterfuge by the police in charging Butler on the original (unrelated) assault charge.

Butler was informed at the start of the interrogation that "Right now we are charging you with murder and kidnapping." (Tr. 42, line 8). According to police accounts, he thereafter waived his right to counsel and his right to remain silent and, eventually, confessed to the crime.

There are several questions raised by these facts. The right to counsel attaches at the start of a custodial interrogation in order to safeguard a suspect's right to be free of self-incrimination under the Fifth Amendment. *Miranda v. Arizona*, 384 U.S. 436 (1966). The separate right to counsel under the Sixth Amendment does not attach until a suspect has formal proceedings initiated, usually by arraignment. *Moran v. Burbine*, —— U.S. ——, 106 S. Ct. 1135 (1986). Specifically, the right to counsel under the Sixth Amendment does not exist prior to "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *United States v. Gouveia*, 467 U.S. 180, 188, quoting *Kirby v. Illinois*, 406 U.S. 682, 688-689 (1972). The right *may* attach as early as the time of arrest, *United States v. MacDonald*, 456 U.S. 1, 6-7 (1982), but the Court in *Gouveia*, *supra*, at 190, declined to hold that an arrest always triggers the right to counsel. In short, a defendant has a right to counsel under both the Fifth and Sixth Amendments, but that right attaches at different times under each Amendment. See discussion in *Michigan v. Jackson*, —— U.S. ——, 106 S. Ct. 1404 (1986). A series of recent Supreme Court cases, including *Moran v. Burbine* and *Michigan v. Jackson*, *supra*, have discussed when and under what circumstances a suspect's Sixth Amendment right to counsel attaches.

One decision is particularly close to the facts in the instant case. In *Maine v. Multon*, 106 S. Ct. 477 (1985), a suspect had been indicted for one crime, but was out on bond awaiting trial. A co-defendant offered to act as

an informer and police arranged to record conversations between the two men. Evidence was gathered in this manner both as to the first crime *and* as to a second, planned crime. The Court, in a decision written by Justice Brennan, held that the information gathered in this manner was inadmissible as to the first crime because the suspect's Sixth Amendment right to counsel had attached when he was formally charged with the crime, and thereafter, police could not act in any way which circumvented that right. The Court also held, however, that the evidence gathered as to the *second* crime would be admissible in a trial on those charges, because the right to counsel had not yet attached as to that crime. *Maine v. Moulton*, *supra*, n. 16. In short, the Sixth Amendment right to counsel attaches separately for each crime, and its existence for one charge does not "carry over" to another charge.

In the instant case, petitioner's separate right to counsel under the Sixth Amendment had attached as to the unrelated assault charge, but as to the murder charge, no event which triggers the right to counsel had yet occurred.[3]

B. Petitioner's Fifth Amendment Rights.

Petitioner's Fifth Amendment rights attached, however, at the time of his arrest, when he was taken into custody. Part of petitioner's Fifth Amendment rights include the right to counsel to protect his privilege against self-incrimination, but that right may be waived along with other protections offered by the Fifth Amendment. *North Carolina v. Butler*, 441 U.S. 369 (1979).

One question is whether police had the right to initiate questioning about the murder knowing petitioner had retained an attorney for the assault charge. Police may

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[3] The arrest warrant was not issued until after petitioner gave a statement. (App. 437-440).

reinstitute questioning after a suspect has requested an attorney, as long as an attorney has been available to the suspect in the interim. *U.S. v. Halliday*, 658 F.2d 1103 (5th Cir. 1981), *cert. denied*, 454 U.S. 1127 (1981). In short, if a suspect requests an attorney and is allowed to see one, police may thereafter attempt further questioning despite the absence of counsel.[4] The suspect still has the right to remain silent or to terminate the questioning, but police are not prohibited from periodically inquiring if the suspect will talk. *Michigan v. Mosley*, 423 U.S. 96 (1975). In *Mosley* a suspect arrested on a robbery charge was given his *Miranda* warnings and specifically declined to talk to police officers. Several hours later, he was again given his *Miranda* warnings and questioned about a murder, to which he confessed. *Mosley, supra*, at 98. The Court allowed the use of that confession because Mosley never attempted to invoke his Fifth Amendment rights during the second questioning about a different crime. Specifically, the second interrogation did not undercut defendant's earlier decision not to answer inquiries about the first crime, and the questioning focused only on a crime different in time, place and nature from the first crime.

Petitioner refers this Court to *United States, ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir. 1987). For purposes of this inquiry, whether police may initiate an interrogation after the Fifth Amendment right to counsel has attached, *Espinoza* presents an identical factual situation to the instant case. The Seventh Circuit Court of Appeals affirmed the habeas relief granted

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[4] Most fact situations in the cases reviewed are similar to the situation here. The defendant's attorney was not present, but defendant did not request his presence, in spite of being given another set of *Miranda* warnings, nor did defendant attempt to cut off questioning in any other manner.

below for different reasons. The court of appeals granted relief on the ground that the police violated Espinoza's Fifth Amendment right to counsel by initiating an interrogation after Espinoza had impliedly invoked his Fifth Amendment right to counsel by accepting an attorney at a previous arraignment on an unrelated charge. The Court held that Espinoza's waiver, even if otherwise valid, was ineffective since the police violated the prophylactic rule established by *Edwards v. Arizona*, 451 U.S. 477 (1981), when they initiated the interrogation.

This Court need not consider the propriety of the principles established in *Espinoza* inasmuch as the underlying ruling in *Edwards v. Arizona* may not be applied retroactively. *Solem v. Stumes*, 465 U.S. 638 (1984). Petitioner was convicted January 24, 1981. The sentencing phase of his trial was concluded on January 26, 1981. *Edwards* was decided May 18, 1981.

Having concluded that the police did not wrongfully reinstitute questioning, the next issues that must be resolved are whether petitioner made both a voluntary and a knowing and intelligent waiver of his Fifth Amendment right to counsel. These are separate inquiries. *Wilson v. Murray*, 806 F.2d 1232 (4th Cir. 1986).

A confession cannot be held involuntary and therefore inadmissible under the Due Process Clause unless it is linked to coercion by government agents. *Colorado v. Connelly*, —— U.S. ——, 107 S. Ct. 523 (1986).

Many of the crucial facts concerning this inquiry are disputed. The police repeatedly testified that they read and explained petitioner's *Miranda* rights to him. The officers also stated that neither verbal nor physical abuse occurred during the interrogation. Furthermore, they contended, no one officer was ever alone with the peti-

tioner. Ostensibly, the reason for this policy is to guard against the coercive conduct alleged here by an overzealous officer.

In direct contradiction, the petitioner testified that he was beaten and verbally abused. His statements regarding physical abuse are significantly undermined by the fact that his attorney visited the petitioner within one hour of his return to jail. (Tr. 108). Despite this narrow time lapse the attorney did not attempt to testify about the petitioner's condition at that time or the presence of any marks from the alleged abuse. Petitioner's credibility is hampered further by his inconsistent statements relating to advice from his attorney. At the suppression hearing the petitioner did not remember his attorney telling him not to speak to the officers. (Tr. 96, 1n. 25). Yet at the post-conviction relief hearing, he clearly remembered the admonition. (App. 222, 1n. 8).

An undisputed fact of importance remains that the petitioner signed two waiver of rights forms.

According to *Miller v. Fenton*, —— U.S. ——, 106 S. Ct. at 451 (1986), a trial judge's conclusion that the police did not engage in intimidation tactics is entitled to the § 2254(d) presumption of correctness. At the suppression hearing the trial judge ruled that the confession was voluntary. (Tr. 121).

This Court concludes based on the record and the trial judge's ruling that the statements were voluntarily given.

We must next consider whether the waiver of the right to counsel was a knowing and intelligent waiver. We need not decide whether petitioner's decision was wise, but only whether it was made with an understanding of the protections involved.

According to the police, Butler was alert and responsive throughout the interrogation. (Tr. 42, 62, 63, 70).

He appeared to understand and assented to his understanding of his *Miranda* rights as those rights were explained to him. (Tr. 44-45). Despite the petitioner's statements at his post-conviction relief hearing that he did not know what a confession or a jury trial were (App. 229-230), this Court concludes that Butler possessed the ability to understand and comprehend his legal rights. Both the petitioner and his attorney indicated that Butler actively participated in his trial and the negotiations preceding the trial. Petitioner discussed the following topics at length with his attorney: the events of his interrogation (App. 229-230), guilty plea negotiations (App. 234-235), selection of witnesses and the substance of their testimony (App. 231-232) and the strategic implications of his testimony (App. 237).

Additionally, the petitioner and his elementary school principal, Isiah Frazier, testified that he possessed some literacy skills. (App. 208; Tr. 93). Lastly, the petitioner was not unfamiliar with police procedure. He testified that he had been arrested on four previous occasions. (Tr. 104).

Based on this testimony, this Court concludes that the petitioner made a knowing waiver of his right to counsel. Having made a valid waiver of his Fifth Amendment rights, petitioner was not entitled to an attorney under the Fifth Amendment. His Sixth Amendment right to counsel had not yet attached for the murder charge since no formal proceedings in the prosecution of that charge had been instituted.

CONCLUSION

After reviewing the record, the applicable law, and the Magistrate's Report, which is hereby adopted in full, the Court finds that there is no genuine issue as to any material fact and that the respondents are entitled to judgment as a matter of law.

IT IS, THEREFORE, ORDERED that the respondents' motion for summary judgment be and hereby is granted and this case is dismissed.

IT IS SO ORDERED.

/s/ G. Ross Anderson, Jr.
G. Ross Anderson, Jr.
United States District Judge

Anderson, South Carolina

June 5th, 1987.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 87-4004

Horace Butler,
Petitioner-Appellant,
v.

James Aiken, Warden, Central Correctional Institute; Travis Medlock, Attorney General, State of South Carolina,
Respondents-Appellees.

Argued Jan. 7, 1988

Decided May 6, 1988

Before RUSSELL, HALL, and CHAPMAN, Circuit Judges.

K.K. HALL, Circuit Judge:

Horace Butler, a South Carolina inmate currently awaiting execution for the crime of murder, appeals an order of the district court dismissing his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. We affirm.

I.

Butler was tried by a South Carolina state court in 1981 for the 1980 murder of Pamela Lane. According to the facts developed at trial, Lane, a clerk at a convenience store north of Charleston, South Carolina, was last seen alive when she left her place of employment at approxi-

mately 10:30 p.m. on July 17, 1980. At that time, she was riding a new moped that had been delivered to her earlier that evening. She never arrived at her home.

The next morning, Lane's sister reported her disappearance to the authorities. A few hours later, near a bridge, fishermen discovered a body which was subsequently identified as that of Pamela Lane. She had been shot once in the chest by a small caliber gun. The following day a local minister found a moped submerged in a pond behind his church. The moped was identified as the one Lane was riding when last seen.

On August 30, 1980, Butler was arrested on an unrelated charge of assault and battery and placed in the Charleston County Jail. Butler retained local counsel who appeared with him at a bond hearing on August 31, 1980. He was unable to make bond, however, and was returned to custody in the County Jail. Butler's attorney would later contend in state post-conviction proceedings that he directed police officers not to question Butler further. The officers, however, testified that they remembered no such instruction.

At approximately 12:15 a.m. on September 1, 1980, Butler was taken from the jail and transported to the Charleston County Police Department. He was then informed for the first time that he was under suspicion for the murder of Pamela Lane. After receiving the warnings regarding his constitutional protection against compulsory self-incrimination, as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), Butler indicated that he understood his rights and signed two separate waiver forms. At no time during the ensuing interrogation did Butler request the presence of his attorney.

Butler subsequently offered two explanations of Lane's death. In his first confession, he claimed that a friend, Larry White, had killed Lane and then sought his help in disposing of the moped. When police told Butler that

they did not believe the story, he offered a second confession in which he admitted to killing Lane. According to the second confession, Butler saw Lane riding on her moped and followed her. When he blinked his automobile lights at her, she pulled off the road, hid the moped in the bushes, and voluntarily accompanied him in a drive to a nearby wooded area. Butler claimed that Lane engaged in consensual sex with him and then threatened to "cry rape" when she realized that she would be late getting home. Butler maintained that he panicked, shot Lane with a handgun in his possession, and then dumped her body off a bridge. He further claimed that Larry White helped him dispose of the moped. Butler later took police to the area where the events allegedly occurred and identified the location of Lane's death.

Butler was subsequently indicted and brought to trial on the charge of murder in the first degree. After a motion to suppress his custodial statements was denied, his two confessions to the Charleston police were introduced into evidence. The jury found him guilty of Lane's murder and, in a separate proceeding, sentenced him to death after concluding the murder had occurred while the defendant was engaged in the crime of rape.

Butler's conviction was upheld on direct appeal to the South Carolina Supreme Court in 1982. A petition for a writ of certiorari was denied by the United States Supreme Court in that same year. In 1983, Butler unsuccessfully petitioned for state post-conviction relief. That denial of relief was also affirmed by the South Carolina Supreme Court, and the United States Supreme Court again denied a petition for certiorari. Butler thereby exhausted his available state remedies.

On May 2, 1986, Butler filed the instant petition for federal habeas relief pursuant to 28 U.S.C. § 2254. The matter was referred to the United States Magistrate for report and recommendation pursuant to 28 U.S.C. § 636 (b) (1) (B). On May 9, 1987, the magistrate issued his

report finding no basis for granting relief to Butler. The magistrate also recommended that a motion for summary judgment presented on behalf of the respondent state officials be granted. After conducting a lengthy *de novo* review of all portions of the magistrate's report to which Butler had objected, the district court also concluded that petitioner did not merit habeas relief. Accordingly, the district court granted the respondent's motion for summary judgment and dismissed the petition. This appeal followed.

II.

On appeal, petitioner contends that he is entitled to habeas relief because (1) his counsel in the proceedings below was constitutionally ineffective; (2) errors in the jury selection process violated his rights under the sixth and fourteenth amendments; (3) his two confessions were improperly admitted at trial; (4) the jury at his trial was improperly instructed; (5) the prosecution's use of rape as an aggravating circumstance justifying the death penalty was improper; and (6) the state of South Carolina failed to conduct an adequate proportionality review of his case to determine whether the death penalty was the appropriate punishment. All of these contentions were exhaustively considered and rejected by the district court. We find the district court's analysis sound and persuasive in all respects save its treatment of the admissibility of petitioner's confessions. On that single issue, we conclude that some further discussion is necessary. On all other claims advanced by petitioner, however, we affirm the denial of habeas relief for the reasons expressed by the district court. *Horace Butler v. James Aiken, Warden, Central Correctional Institution, and Travis Medlock, Attorney General, State of South Carolina*, —— F.2d —— C/A No. 86-1093-3 (D.S.C. June 9, 1987).

With regard to his confessions, Butler contends that the statements elicited from him by the Charleston Police

on September 1, 1980, were obtained in violation of his fifth amendment right to counsel. He concedes that the warnings mandated by *Miranda v. Arizona, supra*, were given before any interrogation concerning Lane's death occurred. He further concedes that he signed waivers in which he agreed to permit police questioning without the presence of an attorney. Petitioner argues, however, that under the "bright line" rule established in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the undisputed invocation of his fifth amendment right to counsel when he was first arrested barred the police from initiating any further uncounseled interrogation. The waiver forms were, in petitioner's view, presumptively invalid.

Noting that Butler's trial had preceded the decision in *Edwards* and that the Supreme Court in *Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984), had rejected retroactive application of the rule articulated in *Edwards*, the district court summarily rejected this portion of Butler's petition. Unfortunately, the district court's failure to address this claim on the merits must be regarded as error. Although *Edwards* does not have retroactive effect, it does apply to cases pending on direct appeal at the time it was announced. *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985). Butler's appeal was in fact pending at that time. We must, therefore, consider whether Butler's interrogation did produce incriminating statements in violation of his constitutional right to counsel. We are convinced that it did not.

An immediate factual distinction may be drawn between Butler's interrogation and that of the criminal defendant in *Edwards*. The defendant therein was arrested on charges of first degree murder. After some preliminary questioning, he terminated the interrogation by requesting an attorney. The next morning, police officers approached the defendant and without providing counsel,

renewed questioning on the very offense on which he had previously requested counsel. In requiring suppression of the resulting confession, the Supreme Court held that when an accused has expressed a desire to deal with the police only through counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484-85, 101 S.Ct. at 1885.

In the instant case, the Charleston police did not attempt to renew their inquiry into the assault and battery charges on which Butler had been arrested. Rather, the questioning initiated on September 1, 1980, dealt only with a hitherto uncharged offense—the murder of Pamela Lane. Not surprisingly, Butler argues on appeal that this factual distinction is irrelevant to the constitutional inquiry. Relying upon a recent decision from the Seventh Circuit, Butler contends that the correct application of *Edwards* requires that during continuous custody, the police refrain from any further questioning once an accused has invoked a right to counsel on any offense. *See United States ex rel Espinoza v. Fairman*, 813 F.2d 117 (7th Cir.1987). We are not persuaded, however, by the Seventh Circuit's dramatic extension of *Edwards*.

The fifth amendment right to counsel exists throughout the time that an accused is in police custody in contrast to the protection provided by the sixth amendment which arises only when formal proceedings are begun—when the individual becomes the accused.[1] *Escobedo v.*

[1] On September 1, 1980, Butler unquestionably possessed a sixth amendment right to counsel with regard to the offense on which he had been arrested and denied bond. No formal charges had been filed against him in connection with Lane's death, however, and thus no sixth amendment right had arisen in that area. For that reason, it is essentially irrelevant whether Butler's counsel in fact instructed police not to question him further.

Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). The court in *Espinoza* reasoned that since the right to counsel extended continuously through a period of custody, the invocation of that right, as protected by *Edwards*, must be of similar duration. The court further reasoned that requiring a crime-by-crime invocation of the fifth amendment right would be inconsistent with the decision in *Colorado v. Spring*, 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987) (waiver of fifth amendment right at the beginning of interrogation remains valid even if police questioning moves without warning from crime on which defendant was arrested to an entirely different offense). Although superficially appealing, we are convinced that the decision of the Seventh Circuit pursues a false symmetry while cutting the decision in *Edwards* away from its conceptual base.

As the Supreme Court has observed, the "prophylactic rule" adopted in *Edwards* "has only a tangential relation to truthfinding." *Solem*, 465 U.S. at 642, 104 S.Ct. at 1341. It was articulated as a reflection of the Court's belief that additional procedural safeguards were needed to protect an accused's preexisting right to request counsel during custodial interrogation. *Id.* at 645, 104 S.Ct. at 1342. Such "safeguards" by their inherent nature are a judicial response to specific and identifiable conditions that undermine the perceived integrity of the legal system. In *Miranda*, for example, the Court sought to insure that statements made by an accused while in the unavoidably coercive atmosphere of custodial interrogation could reasonably be viewed as truly voluntary. In *Edwards*, the Court's concern lay with police conduct that might badger an accused into abandoning a previously invoked right.

We fail to see how the actions of the Charleston police could fall within the intent of the Court in *Edwards*. There is no suggestion that Butler's arrest on the assault charges was a sham intended to make him avail-

able for questioning upon a more serious offense. Neither was there "reinterrogation" on the same offense, *Edwards*, 451 U.S. at 485, 101 S.Ct. at 1885, that might have sent mixed signals regarding his continuing right to request counsel. Certainly, if Butler had been released on bond and then rearrested an hour later on murder charges, the authorities would have been permitted to engage in proper interrogation. We see no reason for a different result simply because the custody was continuous.

Properly initiated interrogation on entirely new charges does not intrude into an accused's previously invoked rights but rather offers that accused an opportunity to weigh his rights intelligently in light of changed circumstances. When, as occurred in this case, the accused then freely waives any constitutional right to counsel and provides voluntary statements of an incriminating nature, there is no justification for undermining the search for truth by suppressing those statements.

Unlike the Seventh Circuit, we perceive no conflict between this conclusion and the Supreme Court's reasoning in *Colorado v. Spring*, *supra*. A voluntary waiver of rights by an accused in custody conclusively demonstrates that the accused does not find the general custodial atmosphere unduly coercive. The coercive nature of the custodial environment does not change simply because the subject of the interrogation shifts. There is, therefore, as the Court in *Spring* recognized, no reason why the authorities should renew the *Miranda* warnings each time a new topic is raised in interrogation. The accused has received all of the "prophylactic" protection to which he is entitled.

The scope of the invoked fifth amendment right to counsel presents an entirely distinct conceptual issue. The question is no longer whether the authorities have met their responsibility, but whether the accused wishes

to deal with the authorities personally or through counsel. Knowledge of the charges is clearly relevant in this area. Logically, the decision to seek counsel may change depending upon the accused's assessment of his circumstances. There is, therefore, no compelling reason to assume that the invocation of a right to counsel on one offense automatically applies to later charges brought to the attention of the accused. Certainly, there is no reason why the authorities cannot, at least, inquire if the accused wishes to deal with the new charges through counsel.

This Court has recently expressed serious reservations concerning the use of *per se* reversal rules in federal habeas proceedings. *Perry v. Leeke*, 832 F.2d 837 (4th Cir.), *cert. granted*, —— U.S. ——, 108 S.Ct. 1269, 99 L.Ed.2d 480 (1988). While a federal habaes court must ensure that a petitioner's constitutional rights have been scrupulously observed, it must also be aware of societal cost attendant to a reversal of a state criminal conviction. Fidelity to the law, of course, demands adherence to established "bright line" *per se* rules such as that articulated in *Edwards* even when they result in reversal of otherwise valid criminal convictions. Unlike the Seventh Circuit, however, we are not inclined to extend those rules to circumstances where they are unjustified and unnecessary.

III.

We are, therefore, fully satisfied that petitioner's confessions, preceded by appropriate warnings and a voluntary waiver of fifth amendment protections, were not obtained in violation of his constitutional rights or the prophylactic rule of *Edwards v. Arizona*. Accordingly, the denial of habeas relief to petitioner is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Title Omitted in Printing)

ORDER

Before the Court for reconsideration is Horace Butler's petition for rehearing with regard to his appeal of the district court's order denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Butler, a South Carolina inmate, was convicted in state court in 1981 for the 1980 murder of Pamela Lane. After exhausting state remedies, Butler petitioned for federal habeas relief asserting a broad range of constitutional objections to the state criminal proceedings. Finding no merit in any of his claims, the district court denied relief and we affirmed. *Butler* v. *Aiken*, No. 87-4004 (4th Cir. May 6, 1988). A petition for rehearing and suggestion of rehearing en banc was subsequently denied on June 15, 1988.

In our opinion, we rejected the bulk of Butler's contentions for the reasons soundly expressed below by the district court. We addressed, in detail, only Butler's claim that his confession resulting from interrogation on murder charges following his arrest and appearance with counsel on an unrelated offense violated the "bright line" rule against reinterrogation established in *Edwards v. Arizona*, 451 U.S. 477 (1981). Our conclusion that *Edwards* does not bar such interrogation if properly preceded by appropriate warning and waiver in accordance with *Miranda v. Arizona*, 384 U.S. 486, was cast into immediate and serious doubt by the Supreme Court's decision in *Arizona v. Roberson*, 56 U.S.L.W. 4590 (U.S. June 15, 1988). The *Roberson* Court expressly held that

the *Edwards* rule does bar police initiated interrogation following a suspect's request for counsel in the context of a separate investigation. 56 U.S.L.W. 4593.

In light of *Roberson*, we determined that Butler's petition for rehearing should be reconsidered. Accordingly, we directed petitioner and respondents to file supplemental briefs on this issue. We have now received and examined that supplemental briefing. The petition for rehearing is, therefore, ripe for disposition.

As an initial matter, we reject respondents' effort to distinguish *Roberson* factually. We assume for purposes of decision that the appearance of counsel with Butler at a bond hearing on the assault charge for which he was first arrested conclusively demonstrated invocation of Butler's fifth amendment rights. The subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the *Edwards* rule as modified in *Roberson*. If this case were before us on direct appeal, we would in all likelihood be compelled to reverse the conviction and remand for a new trial. It does not follow, however, that Butler is entitled to habeas relief based upon a rule of law that was not in effect at the time of his arrest and trial.

The retroactive effect of decisions such as *Roberson* in collateral proceedings is determined in accordance with three factors: (1) the purpose of the new rule of law; (2) the extent of reliance by law enforcement authorities on the old standard; and (3) the effect of retroactive application upon the administration of justice. *Allen v. Hardy*, —— U.S. ——, 106 S.Ct. 2878, 2880 (1986). Although all are relevant, it is the first factor that is perhaps the most important for it is only when the new judicial formulation "enhances the accuracy of criminal trials" and "goes to the heart of the truth finding function," *Solem v. Stumes*, 465 U.S. 638, 643-45 (1984), that retroactivity is most appropriate.

Applying this test to the instant case, we are fully satisfied that Butler may not claim any retroactive benefit from *Roberson*. The *Edwards-Roberson* limitations on police interrogation have only the most tangential relationship to truth finding. They are, rather, a part of the prophylactic protection accorded the fifth amendment right to counsel as a means of establishing "guidelines to the law enforcement profession." *Roberson*, 56 U.S.L.W. at 4592. The interrogation of appellant, while unquestionably contrary to the present "guidelines," was conducted in strict accordance with established law in 1980. We, therefore, conclude that Butler may challenge his presumptively valid conviction only by demonstrating that there was an actual violation of his constitutional rights in 1980. On that dispositive issue, the record discloses no support for Butler's claim for habeas relief.

It is undisputed that local authorities provided full *Miranda* warnings before questioning Butler on the Lane murder. It is further undisputed that Butler twice evidenced his knowing consent to interrogation without the presence of counsel by executing signed waivers. Every court that has considered this matter has concluded that the waiver of rights was uncoerced and utterly voluntary. There is, therefore, no reason to find a technical violation based upon newly announced law when the record reveals that appellant freely waived any fifth amendment protections in 1980.

For the foregoing reasons, we conclude that our initial affirmance of the district court's decision in this matter was appropriate in substance.

In a requested poll of the Court on the suggestion for rehearing en banc, Chief Judge Winter, Judge Phillips, Judge Murnaghan, Judge Sprouse, and Judge Ervin voted to rehear the case en banc; and Judge Russell, Judge Widener, Judge Hall, Judge Chapman, Judge Wilkinson, and Judge Wilkins voted against rehearing en banc.

As the panel has considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing en banc, it is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

ENTERED with the concurrences of Judge Russell and Judge Chapman.

/s/ K. K. Hall
K. K. HALL
U.S. Circuit Judge

Filed: December 2, 1988

WINTER, Chief Judge, dissenting:

I respectfully dissent from the denial of rehearing in banc because I believe that Butler's conviction was obtained in violation of applicable constitutional law. A life is at stake in this case. I have no doubt, therefore, that the validity of Butler's conviction presents a question of "exceptional importance." F. R. App. P. 35(a).

I.

As the majority correctly states, Butler requested counsel when questioned about the offense for which the authorities were holding him. Shortly thereafter, and in the absence of that counsel, Butler was interrogated about an unrelated offense. The government obtained from him self-incriminating statements about the unrelated offense. There is no evidence that Butler initiated the interrogation that resulted in his self-incriminating statements. He was convicted by the use of those statements.

The majority expresses the view that if Butler's case were before it on direct appeal, it would "in all likelihood" be compelled to reverse the conviction and remand for a new trial. But, the majority maintains, because Butler's case is before it on denial of a petition for habeas corpus, he is not entitled to relief, as the rule of law on which he relies to bar the use of his uncounselled confession was not in effect at the time of his arrest and trial. Specifically, the majority's view is that an interrogation such as Butler's did not violate Edwards v. Arizona, 451 U.S. 477 (1981), until *Edwards* was "modified" in Arizona v. Roberson, 486 U.S. —— (June 15, 1988). Because *Roberson* was not decided until after Butler's conviction became final, Butler is entitled to invoke *Roberson*, in the view of the majority, only if *Roberson* is held to be retroactive. The majority concludes that *Roberson* does not meet the test for retroactive application.

In making Butler's entitlement to relief depend upon the retroactivity of *Roberson*, the majority, in my view, incorrectly construes both *Edwards* and *Roberson*.

II.

Imprimis, I think that Butler's confession was constitutionally inadmissible under *Edwards* standing alone. *Edwards* stated unconditionally that a suspect who has "expressed his desire to deal with police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication." 451 U.S. at 484-85. It is true that, in *Edwards*, the subject about which the accused was wrongly interrogated was the crime for which the authorities were holding him. But there is not the slightest suggestion in the Court's opinion that its holding was limited by the subject of the interrogation. Indeed, the Court in *Edwards* expressly reconfirmed its previous characterization of the rule in Miranda v. Arizona, 384 U.S. 436 (1966), as a command that, upon an accused's request for counsel, "*all* interrogation cease." *Edwards*, 451 U.S. at 485 (quoting Fare v. Michael C., 442 U.S. 707, 719 (1979) (emphasis added)).

Edwards was decided before Butler's trial. And even when decided, *Edwards* did not purport to create new law. *Edwards* was simply a reconfirmation of the guideline articulated in *Miranda* that if a person held for interrogation "states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda*, 384 U.S. at 474. Nothing in *Miranda* indicated that application of this rule was to vary with the subject of the interrogation.

In *Edwards*, the Court reviewed *Miranda* and subsequent cases recapitulating "*Miranda*'s 'rigid rule that an

accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that *all* interrogation cease.'" *Edwards*, 451 U.S. at 485 (quoting *Fare*, 442 U.S. at 719 (emphasis added)). Upon so doing, the Court concluded:

> We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.

Id. Thus, the *Edwards* Court did not regard its holding as other than a "reconfirmation" of *Miranda*.

Roberson did not alter these rules of law. It simply rejected Arizona's attempt to change the rules. In the very opening paragraph of the Court's opinion, Justice Stevens, writing for the majority, described the case as one in which "Arizona asks us to craft an exception [to the *Edwards* rule] for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation." 486 U.S. at ——. This the Court declined to do. Instead, it expressed agreement with an earlier Arizona decision holding that *Edwards* was equally applicable whether the interrogation was about either the offense giving rise to the arrest or an unrelated offense. The opinion then documented how the Court has never departed from its holding in *Miranda*, as reconfirmed in *Edwards*, and set forth the reasons why it would not do so in the case before it.

In sum, *Roberson* says that the law *is* and *has been*, since *Miranda*, that a suspect who has expressed his desire to deal with the police only through counsel is not subject to further interrogation about *either* the crime he is suspected of having committed *or any other crime* until counsel has been made available, unless the suspect

initiates further communication with the police.* There is thus no retroactivity issue presented in the instant case. Butler merely seeks to invoke the law in effect when he was tried and convicted. I think that he has the right to do so, and that he is entitled to habeas relief.

Judges Phillips, Murnaghan, Sprouse and Erwin authorize me to say that they join in this dissent.

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* My reading is reinforced by what Justice Kennedy, who was joined by the Chief Justice, wrote in dissent in *Roberson*. He rejected the majority's characterization of the case as one in which the Court was asked to "craft an exception" to *Edwards*. He asserted instead that *Roberson* was the first case in which the Court was "asked to apply *Edwards* to separate and independent investigations." 486 U.S. at ——. While the majority in the instant case obviously prefers this characterization of *Roberson*, I remind the majority that, as in inferior appellate court, we are bound to follow the Supreme Court majority, whether we agree or disagree.

SUPREME COURT OF THE UNITED STATES

No. 88-6677

HORACE BUTLER,

Petitioner

v.

KENNETH D. MCKELLAR, WARDEN, *et al.*

ORDER ALLOWING CERTIORARI

Filed May 1, 1989

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is orderd by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 1, 1989

Supreme Court, U.S.
FILED
JUL 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-6677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HORACE BUTLER,

Petitioner,

v.

KENNETH D. MCKELLAR, Warden, and the Attorney General of South Carolina, T. TRAVIS MEDLOCK,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

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Did the Court of Appeals violate the rule announced in *Shea* v. *Louisiana* by denying petitioner the benefit of *Edwards* v. *Arizona*, despite the fact that petitioner's conviction was not yet final on direct review at the time *Edwards* was decided?

II.

Did the Court of Appeals' majority misread *Arizona* v. *Roberson* as creating a "new" rule of constitutional law?

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BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the District of South Carolina, denying Butler's petition for habeas corpus is unreported and is reproduced in the Joint Appendix (J.A.) at 91-124. The initial panel opinion of the Court of Appeals for the Fourth Circuit, affirming the denial of habeas relief, is reported as *Butler* v. *Aiken*, 846 F.2d 255 (4th Cir. 1988), and is reproduced at J.A. 125-133. The order of the Court of Appeals denying rehearing and rehearing *en banc* is unreported. The order modifying the panel's decision on reconsideration of the order denying rehearing, and denying rehearing *en banc*, with five judges dissenting, is reported as *Butler* v. *Aiken*, 864 F.2d 24 (4th Cir. 1988), and is reproduced at J.A. 134-141.[1]

JURISDICTION

The order of the Court of Appeals denying rehearing and rehearing *en banc* was entered on December 2, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), petitioner having asserted below and asserting herein a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides in pertinent part:

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[1] The opinion of the South Carolina Supreme Court affirming petitioner's conviction and sentence of death is reported as *State* v. *Butler*, 277 S.C. 452, 290 S.E.2d 1, *cert. denied*, 459 U.S. 932 (1982). The South Carolina Supreme Court's opinion affirming the denial of post-conviction relief is reported as *Butler* v. *State*, 286 S.C. 441, 334 S.E.2d 813 (1985), *cert. denied*, 474 U.S 1093 (1986).

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Horace Butler, a mentally retarded black person,[2] was convicted and sentenced to death for the murder of Pamela Lane. A key piece of evidence against him was his confession. The Court below found that this confession was obtained in violation of the Fifth Amendment principles of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), and *Arizona* v. *Roberson*, ___ U.S. ___, 108 S.Ct. 2093 (1988), but denied habeas corpus relief on the sole ground that *Roberson* should not be applied retroactively to petitioner's conviction, which had become final on direct review after *Edwards* but before *Roberson*. The pertinent facts are as follows.

Four Charleston County police officers arrested petitioner on the evening of August 30, 1980, on an assault charge—later dismissed—which was apparently unrelated to the murder of Pamela Lane.[3] The officers brought

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[2] The state court record reveals that petitioner has an I.Q. of 69 and a mental age of between seven and eight. Joint Appendix in Court of Appeals at 1207; 1222. When he ended his education at age sixteen, he had completed the fourth grade.

[3] The charges were unrelated only in that they did not involve the same underlying offense. The record compels the conclusion that at the time of petitioner's arrest on the assault charges he was a—if not the—prime suspect in the murder of Pamela Lane. The officer who arrested petitioner on the assault charge, Officer Eugene Frazier, was in charge of the investigation of the Lane homicide, and had been intensely investigating the case since August 24, 1980. J.A. 28-29. Officer Frazier subsequently ordered the interrogation which resulted in the statement involved in this case. J.A. 4.

petitioner to the Charleston County Jail, where he remained until his bond hearing late the following evening. J.A. 26, 4. Prior to the hearing, petitioner invoked his right to counsel by retaining a local attorney, W. McAlister Hill. J.A. 66.[4] Hill appeared with petitioner at the bond hearing on the evening of August 31. J.A. 65; 56. Petitioner was unable to post bond, and was returned to the county jail. Hill testified at the state post-conviction hearing that he warned the police against any further questioning of his client, but the officers claimed not to remember any such instruction. J.A. 115, 65, 56.

Shortly after the bond hearing, at 12:15 a.m. on September 1, the same four officers who had arrested petitioner on the assault charge brought him to the Charleston County Police Headquarters where they initiated an interrogation concerning the murder of Miss Lane. J.A. 115. After informing petitioner that they were

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[4] This Court recognized in *Maine* v. *Moulton*, 474 U.S. 159, 176 (1985), that a criminal accused has the "right to rely on counsel as a 'medium' between him and the State." Thus an accused can count upon counsel to serve as a buffer; and when he seeks the assistance of counsel this is properly viewed as an indication that he is unable "to cope with the pressures of custodial interrogation without counsel" being present. *Roberson*, *supra*, 108 S.Ct. at 2100. Counsel's role as a 'medium' is particularly important to a mentally retarded person such as petitioner because persons with mental retardation are, as a direct result of their disability, much more open to suggestion, more easily coerced by subtle police methods, and more likely to acquiesce in a police interrogation than a non-retarded individual. *See* Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414 (1985). A person with mental retardation is not capable of maintaining continuing vigilance to protect his own interests in repeated interchanges with the police; after he obtains counsel, he needs the assurance that counsel will continue to serve as his protector in any subsequent police-initiated interrogation.

charging him with the Lane murder, the police officers questioned him for some five hours, during which time they obtained two separate *Miranda* waiver forms and two different statements regarding his participation in the crime. Both of these statements were introduced against petitioner at his trial. Petitioner was not returned to the county jail until 10:30 a.m., after traveling with the police to the scene of the crime.[5]

In January 1981, a Charleston County jury convicted petitioner of murder and sentenced him to death. While petitioner's case was pending on direct appeal to the South Carolina Supreme Court, this Court announced its decision in *Edwards* v. *Arizona*, 451 U.S. 477 (1981). Some nine months after *Edwards* was decided, on February 22, 1982, the South Carolina Supreme Court affirmed petitioner's conviction and sentence of death. *State* v. *Butler*, 277 S.C. 452, 290 S.E.2d 1, *cert. denied*, 459 U.S. 932 (1982).

After exhausting his state collateral remedies, *see Butler* v. *State*, 286 S.C. 441, 334 S.E.2d 813 (1985), *cert. denied*, 474 U.S. 1093 (1986), petitioner filed the present habeas corpus proceeding in the United States District Court for the District of South Carolina alleging, *inter alia*, that his Fifth Amendment rights under *Edwards* had been violated by the police officers' initiation of interrogation about the murder of Pamela Lane, in the absence

[5] The record shows that petitioner's attorney, Mr. Hill, was not informed that the police planned to interrogate his client after the attorney left the bond hearing and petitioner was returned to the county jail. There is not the slightest evidence that Hill consented to any such interrogation. In fact, as was noted previously, Hill testified in the state collateral proceedings that he specifically instructed the police at the bond hearing not to talk to petitioner at all. J.A. 65.

of counsel, after petitioner had sought and obtained counsel's representation in connection with the assault charge. The district court, apparently unaware that petitioner's conviction had not yet become final when *Edwards* was decided, dismissed his *Edwards* claim on the grounds that he was not entitled to retroactive application of the "bright line" test enunciated in *Edwards*. J.A. 120-21. The district court rejected petitioner's reliance on *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117 (7th Cir.), *cert. denied*, 483 U.S. 1010 (1987), a decision granting habeas corpus relief on facts identical in all material respects to those of petitioner's case. The district court concluded that it:

> need not consider the propriety of the principles established in *Espinoza* inasmuch as the underlying ruling in *Edwards* v. *Arizona* may not be applied retroactively. *Solem* v. *Stumes*, 465 U.S. 638 (1984). Petitioner was convicted January 24, 1981. The sentencing phase of his trial was concluded on January 26, 1981. *Edwards* was decided May 18, 1981.

J.A. 121.

The original panel decision of the Court of Appeals found that the district court erred in ruling that the "bright-line" rule established by *Edwards* v. *Arizona* did not apply to petitioner's case. The panel concluded that because petitioner's appeal was pending when *Edwards* was decided, *Shea* v. *Louisiana*, 470 U.S. 51 (1985), mandated that the *Edwards* rule be applied to petitioner's case. *Butler* v. *Aiken*, 846 F.2d 255, 257 (4th Cir. 1988); J.A. 129. However, the panel did not believe the "bright-line" rule of *Edwards* extended to the facts of petitioner's case.

> We fail to see how the actions of the Charleston police could fall within the intent of the Court in

> *Edwards* . . . . We see no reason for a different result simply because the custody was continuous.
>
> Properly initiated interrogation on entirely new charges does not intrude into an accused's previously invoked rights but rather offers that accused an opportunity to weigh his rights intelligently in light of changed circumstances. When, as occurred in this case, the accused then freely waives any constitutional right to counsel and provides voluntary statements of an incriminating nature, there is no justification for undermining the search for truth by suppressing those statements.

846 F.2d at 258-59; J.A. 131-32. Therefore, the panel concluded that petitioner's statements were not obtained in violation of the Fifth Amendment. *Id.*

The same day that the Court of Appeals denied petitioner's request for rehearing and suggestion for rehearing *en banc*, *Butler* v. *Aiken*, No. 87-4004 (4th Cir. June 15, 1988), this Court announced its decision in *Arizona* v. *Roberson*, ___ U.S. ___, 108 S.Ct. 2093 (1988). On petitioner's motion for reconsideration, the Court of Appeals requested that the parties submit briefs as to the effect of the intervening decision in *Roberson*. On December 2, 1988, the panel of the Court of Appeals issued a modified opinion acknowledging that the procedures by which petitioner's statements were obtained were invalid under *Roberson*. The panel found that:

> the appearance of counsel with Butler at a bond hearing on the assault charge for which he was first arrested conclusively demonstrated invocation of Butler's fifth amendment rights. The subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the *Edwards* rule as modified in *Roberson*.

Butler v. *Aiken*, 864 F.2d 24, 25 (1988); J.A. 135. The panel further conceded that if petitioner's case was before the court on direct appeal, it would in all likelihood reverse the conviction and remand the case for a new trial. *Id.* The panel then examined the retroactive effect of *Roberson* in collateral proceedings in accordance with the three factors established by this Court in *Stovall* v. *Denno*, 388 U.S. 293 (1967):

> (1) the purpose of the new rule of law; (2) the extent of reliance by law enforcement authorities on the old standard; and (3) the effect of retroactive application upon the administration of justice. *Allen* v. *Hardy*, ___ U.S. ___, 106 S.Ct. 2878, 2880 (1986).

864 F.2d at 25; J.A. 135. Applying this test, the panel decided that petitioner could not claim any retroactive benefit from *Roberson*.

> The *Edwards-Roberson* limitations on police interrogation have only the most tangential relationship to truth finding. They are, rather, a part of the prophylactic protection accorded the Fifth Amendment right to counsel as a means of establishing "guidelines to the law enforcement profession." *Roberson*, 56 U.S.L.W. at 4592. The interrogation of appellant, while unquestionably contrary to the present "guidelines," was conducted in strict accordance with established law in 1980 [the date of petitioner's arrest]. We, therefore, conclude that Butler may challenge his presumptively valid conviction only by demonstrating that there was an actual violation of his constitutional rights in 1980. On that dispositive issue, the record discloses no support for Butler's claim for habeas relief.

864 F.2d at 25; J.A. 136. In its retroactivity discussion, the modified panel opinion failed to cite or refer to this Court's decision in *Shea* v. *Louisiana*, *supra*, which held that

Edwards was applicable to all cases not yet final on direct review at the time *Edwards* was decided.

Dissenting from the denial of rehearing *en banc*, Chief Judge Winter, joined by four other judges, asserted that petitioner's conviction was obtained in violation of the Fifth Amendment. First, the dissent stated that petitioner's statements were constitutionally inadmissible under *Edwards* standing alone. 864 F.2d at 26; J.A. 139. Chief Judge Winter then stated that *Roberson* did not alter the rules of law set forth in *Edwards*.

> In sum, *Roberson* says that the law *is* and *has been*, since *Miranda*, that a suspect who has expressed his desire to deal with the police only through counsel is not subject to further interrogation about *either* the crime he is suspected of having committed *or any other crime* until counsel has been made available, unless the suspect initiates further communication with the police. There is thus no retroactivity issue presented in the instant case.

864 F.2d at 27; J.A. 140-41 (emphasis in original) (footnote omitted).

This Court granted certiorari on May 1, 1989. J.A. 142.

SUMMARY OF ARGUMENT

The Court of Appeals acknowledged that petitioner's confession was obtained in violation of the constitutional principles delineated in this Court's decisions in *Edwards* v. *Arizona* and *Arizona* v. *Roberson*. Nevertheless, the panel held that *Edwards* and *Roberson* did not apply retroactively to petitioner's case because neither case had been decided at the time the police obtained the incriminating statements. The Court of Appeals' retroactivity holding is in direct conflict with *Shea* v. *Louisiana*, *Griffith* v. *Kentucky*, *Yates* v. *Aiken*, and *Teague* v. *Lane*. *Roberson* did not create a new rule of criminal procedure. Rather, it was merely a straightforward application of the constitutional principles set forth in *Edwards* v. *Arizona* to a somewhat different set of facts.

This Court has previously held in *Shea* v. *Louisiana* that the "bright line" rule of *Edwards* v. *Arizona* applies to all cases which were not yet final on direct review at the time *Edwards* was decided. Petitioner's case was pending on direct appeal in the South Carolina Supreme Court at the time of this Court's decision in *Edwards*. Thus, just as in *Yates* v. *Aiken*, this case presents no genuine issue of retroactivity at all, and the Court of Appeals' holding that petitioner was not entitled to the benefit of *Edwards* and *Roberson* must be reversed.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS DENYING PETITIONER THE BENEFIT OF THE RULE ESTABLISHED IN *EDWARDS* V. *ARIZONA* AND FOLLOWED IN *ARIZONA* V. *ROBERSON* IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *SHEA* V. *LOUISIANA*, WHICH HELD THAT *EDWARDS* APPLIES TO ALL CASES PENDING ON DIRECT APPEAL AT THE TIME THAT *EDWARDS* WAS DECIDED.

A. This Court's Decision In *Arizona* v. *Roberson* Did Not Create A New Rule Of Criminal Procedure, But Merely Applied The Constitutional Principles Established In *Edwards* In a Slightly Different Factual Setting.

In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), this Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing that he responded to further police-initiated interrogation even if he has been advised of his rights." 451 U.S. at 484 (footnote omitted). Further interrogation in the absence

of counsel is permissible only if "the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85; *see also Solem* v. *Stumes*, 465 U.S. 638, 646 (1984). This "bright line" rule of *Edwards* has been consistently reaffirmed by the Court. *See, e.g., Michigan* v. *Jackson*, 475 U.S. 625 (1986); *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984) (applying the *Edwards* rule to invocation of the Sixth Amendment right to counsel).[6]

Last term, in *Arizona* v. *Roberson*, ___ U.S. ___, 108 S.Ct. 2093 (1988), this Court applied the *Edwards* rule to a slightly different factual situation. In *Roberson*, the accused was arrested and advised of his *Miranda* rights. Roberson indicated that he wanted to speak with an attorney before answering any questions. While he was still in custody, a different officer questioned him about a different offense. After again being advised of his rights pursuant to *Miranda*, Roberson waived those rights and gave an incriminating statement to the police as to the second offense. The statement was suppressed by the trial court and the suppression order was affirmed on appeal. Certiorari was granted and this Court affirmed in turn. The Court held that Roberson's case was directly controlled by *Edwards* v. *Arizona*, and, therefore, the fact that the request for counsel occurred in the context of a separate investigation was without constitutional significance. 108 S.Ct. at 2098.[7]

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[6] *See also Moran* v. *Burbine*, 475 U.S. 412 (1986). In *Moran*, the majority, relying on *Miranda* and *Edwards* acknowledged that an accused is not subject to further police initiated interrogation if he "indicates in any manner, at any time, prior to or during questioning" that he desires the assistance of counsel. 475 U.S. at 420.

[7] The Court stated: "[t]hat a suspect's request for counsel should apply to any questions the police wish to pose follows, we think, not only from *Edwards* and *Miranda*, but also from . . . [*Colorado* v. *Spring*, 479 U.S. 564 (1987)]." 108 S.Ct. at 2099.

Both the panel that decided petitioner's case below and the five judges who dissented from denial of rehearing *en banc* agreed that under the Fifth Amendment rule announced in *Edwards* and applied in *Roberson*, petitioner's conviction was constitutionally infirm. However, the panel denied petitioner the benefit of this rule under a retroactivity analysis based on *Stovall* v. *Denno;* and the respondent, in a brief opposing certiorari filed after this Court revisited the subject of retroactivity in *Teague* v. *Lane*, ___ U.S. ___, 109 S.Ct. 1060 (1989), now seeks to uphold the panel's result on the ground that *Roberson* is new law which should not only be applied retroactively to petitioner's case but also strips petitioner of the benefit of *Edwards*. Brief in Opposition at 12-16. This contention is totally without merit.

Teague held that in collateral proceedings "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 109 S.Ct. at 1070 (plurality opinion). The plurality did not "attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes," 109 S.Ct. at 1070, but did offer two general descriptions of a "new rule:" "In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government," 109 S.Ct. at 1070; *see also Penry* v. *Lynaugh*, ___ U.S. ___, No. 87-6177, slip opinion p. 8 (June 26, 1989); and, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 109 S.Ct. at 1070 (emphasis in original); *see also Penry* v. *Lynaugh*, *supra*, p. 8.

Teague derived its retroactivity analysis from *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), which had been drawn heavily upon *United States* v. *Johnson*, 457 U.S. 537

(1982), as endorsing Justice Harlan's separate opinions in *Desist* v. *United States*, 394 U.S. 244, 256 (1969), and *Mackey* v. *United States*, 401 U.S. 667, 675 (1971). Common to all of these analyses is the recognition that "when a decision of this Court merely has applied settled precedents to new and different fact situations, no real question has arisen as to whether the new decision should apply retrospectively;" its retroactivity is "a foregone conclusion." *United States* v. *Johnson*, *supra*, 457 U.S. at 549 (1982); *see also Griffith* v. *Kentucky*, *supra*, 479 U.S. at 324-25 (retroactivity has been the accepted practice "when a decision of this Court did nothing more than apply settled precedent to different factual situations"); *Desist* v. *United States*, *supra*, 394 U.S. at 263 (Harlan, J., dissenting) (a decision would not present retroactivity problems if it "simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law").

This is hardly surprising doctrine. No system of jurisprudence which respects *stare decisis* and views judicial decision-making as bounded by rules of law could conceive that a court is creating a "new rule" whenever it applies a precedent to a slightly different set of facts falling within the plain logical implications of the principle established by the precedent. As Justice Harlan wrote in *Desist*, "one need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation." 394 U.S. at 264. And the very concern that animated *Teague*—the importance of "'treating similarly situated defendants the same,'"

109 S.Ct. at 1069-70—precludes saying that a case which substantively does no more than this is creating a "new rule" instead of evenhandedly applying the old one. *See, e.g.*, *Penry* v. *Lynaugh*, *supra*, slip opinion p. 12-13 (June 26, 1989) (a decision that Texas' death penalty statute, as applied, unconstitutionally foreclosed consideration of Penry's mental retardation in mitigation was not a new rule of law but merely an application of the Eight Amendment principles of *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982)); *Yates* v. *Aiken*, ___ U.S. ___, 108 S.Ct. 534, 538 (1988) (*Francis* v. *Franklin*, 471 U.S. 307 (1985), did not announce a new rule of law but was "merely an application of the principle that governed our decision in *Sandstorm* v. *Montana*, 442 U.S. 510 (1979)"); *Truesdale* v. *Aiken*, 480 U.S. 427 (1987) (per curiam) (reversing a decision of the Supreme Court of South Carolina that denied retroactive effect to *Skipper* v. *South Carolina*, 476 U.S. 1 (1986), and implicitly holding that *Skipper* did not create a new rule of law but only applied the Eighth Amendment principle of *Lockett* v. *Ohio*, *supra*, to a different fact situation).

Teague, like the retroactivity cases that preceded it, is aimed at protecting the justifiable reliance interests of the States. It seeks to avoid the situation in which "'[s]tate courts are . . . frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.'" 109 S.Ct. at 1075. As the Court had previously noted in *Solem* v. *Stumes*, 465 U.S. 638, 646 (1984):

> In considering the reliance factor, this Court's cases have looked primarily to whether law enforcement authorities and state courts have justifiably relied on a prior rule of law said to be different from that

announced by the decision whose retroactivity is at issue. Unjustified "reliance" is no bar to retroactivity. This inquiry is often phrased in terms of whether the new decision was foreshadowed by earlier cases or was a "clear break with the past." When the Court has explicitly overruled past precedent, disapproved a practice it has sanctioned in prior cases, or overturned a longstanding practice approved by near-unanimous lower-court authority, the reliance and effect factors in themselves "have virtually compelled a finding of nonretroactivity." *United States* v. *Johnson*, 457 U.S. 537, 549-550 (1982). *See also id.*, at 551-552. We have been less inclined to limit the effect of a decision that has been "distinctly foreshadowed." *Brown* v. *Louisiana*, *supra*, 447 U.S., at 336.

When a decision simply takes the straightforward step of applying a precedent to a new factual situation that is logically governed by the reasoning of the precedent, making no "break with the past" at all, a state can claim no legitimate reliance interest against giving the benefit of that decision to any person who was entitled to the benefit of the precedent itself.[8]

Such a decision cannot be treated as a "new rule" under *Teague* without subverting *Teague's* own premises. For, as *Teague* noted, quoting Justice Harlan in *Desist*, "'the threat of habeas serves as a necessary incentive for trial and appellate judges throughout the land to conduct their proceedings in a manner consistent with established constitutional principles.'" 109 S.Ct. at 1073. Like all other

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[8] Compare *Teague*, where the constitutional ruling that Teague sought—the application of the fair cross-section requirement of the Sixth Amendment to the petit jury panel—had been previously rejected by this Court in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), and *Akins* v. *Texas*, 325 U.S. 398 (1945). *See* 109 S.Ct. at 1070 n.1.

constitutional principles regulating the conduct of state authorities, those established by this Court to protect the rights of criminal defendants are heavily dependent upon voluntary compliance by state police officers and prosecutors and enforcement by the state courts. Investigating officers, for example, are expected to obey the rule of *Edwards* v. *Arizona:* if they do not, state prosecutors are expected not to offer the resulting confessions in evidence; and if they offer them in evidence, the state courts are expected to exclude them. To paraphrase Justice Harlan in *Mackey*, 401 U.S. at 691, "[n]o one, not criminal defendants, not the judicial system, not society as a whole is benefited" by undermining these expectations. Yet, if the straightforward application of *Edwards* to other fact situations within its logical compass were to be treated as creating a "new rule" for *Teague* purposes, there would be a powerful incentive for the police, prosecutors, and state judges to disobey the "bright line" rule of *Edwards*. Rather than forbearing to offer a confession taken by interrogative methods that should exclude it under *Edwards*, prosecutors would be motivated to offer both the confession and whatever factual distinctions of *Edwards*—plausible or implausible—they could invent. These distinctions might succeed or they might fail in persuading federal judges that *Edwards* was not controlling; but the prosecutor would win either way, since the rejection of any attempted distinction of *Edwards* would constitute a "new rule" sufficient to deprive the defendant and all others in the defendant's temporal cohort of the benefit of *Edwards*. This, of course, is precisely what the respondent is arguing in the present case: that by litigating *Roberson* all the way to this Court and losing it here, Roberson's prosecutors succeeded in denying the benefit of *Edwards* to all similarly situated defendants whose convictions became final between May of 1981 and June of 1988.

The argument does not survive examination. A review of *Arizona* v. *Roberson* plainly reveals that *Roberson* did not create a new rule of criminal procedure, but rather only involved a straightforward application of this Court's prior decision in *Edwards* v. *Arizona*. For example, the *Roberson* Court framed the question presented as whether the Court should "craft an exception to [the rule of *Edwards* v. *Arizona*] . . . for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation." 108 S.Ct. at 2096. The majority ultimately concluded that Arizona's "attempts at distinguishing the factual setting here from that in *Edwards* are . . . unavailing," and affirmed the judgment of the Arizona Court of Appeals. 108 S.Ct. at 2100-01.[9] Thus, *Roberson* made no break with the past and imposed no new obligation on law enforcement personnel. The result reached by the Court was clearly directly controlled by *Edwards*. In sum, *Roberson* did not originate a new rule of constitutional law under any definition of a "new rule;" it is a classic instance of the point frequently repeated by the Court that " 'when a decision of this Court has merely applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively.' " *Yates* v. *Aiken*, *supra*, 108 S.Ct.

[9] The *Roberson* opinion included the following quote from the decision of the Arizona Supreme Court in *State* v. *Routhier*, 137 Ariz. 90, 669 P.2d 68, 75 (1983).

> The only difference between Edwards and the appellant is that Edwards was questioned about the same offense after a request for counsel while the appellant was reinterrogated about a similar offense. We do not believe that this factual distinction holds any legal significance for fifth amendment purposes.

108 S.Ct. at 2096. This Court stated: "We agree with the Arizona Supreme Court's conclusion." *Id.*

at 538 n.3 (quoting *United States* v. *Johnson*, *supra*, 457 U.S. at 549). *See generally Lee* v. *Missouri*, 439 U.S. 461 (1979) (holding that *Duren* v. *Missouri*, 439 U.S. 357 (1979), did not establish a new rule of law because it "did not announce any new standards of constitutional law not evident from the decision in *Taylor* v. *Louisiana*, [419 U.S. 522 (1975)]").

B. Because Petitioner's Case Was Pending On Direct Appeal At The Time That This Court Decided *Edwards* v. *Arizona*, The Court Of Appeals Incorrectly Determined That The "Bright-Line" Rule Established In *Edwards* Did Not Apply In This Case.

Under these circumstances, the question before this Court is whether petitioner is entitled to the benefit of the bright-line rule of *Edwards* v. *Arizona*. The Court of Appeals determined that the Fifth Amendment principle established in *Edwards* and followed in *Roberson* did not apply in petitioner's case because *Edwards* had not been decided at the time of petitioner's arrest in 1980. The panel stated:

> We, therefore, conclude that Butler may challenge his presumptively valid conviction only by demonstrating that there was an actual violation of his constitutional rights in 1980.

864 F.2d at 4; J.A. 136. The modified order of the panel totally ignores one basic fact which is dispositive of this issue: *Edwards* v. *Arizona* was decided while petitioner's case was pending on direct appeal to the South Carolina Supreme Court. Thus this Court has already resolved the retroactivity question presented.

In *Shea* v. *Louisiana*, 470 U.S. 51 (1985), the Court specifically held that *Edwards* applied to cases pending on direct review at the time it was decided. 470 U.S. at 59.

The *Shea* holding was reaffirmed in *Griffith* v. *Kentucky*, *supra*, 479 U.S. at 328, and again in *Teague* v. *Lane* and *Penry* v. *Lynaugh*. The Court of Appeals' decision erroneously focused on the state of the law at the time of petitioner's arrest. However, this Court's recent retroactivity decisions make clear that the controlling inquiry is whether the constitutional rule whose benefit is claimed was in effect at the time the claimant's conviction became final on direct appeal. *See Griffith*, 479 U.S. at 328 ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final"); *Yates* v. *Aiken*, *supra*, 108 S.Ct. at 537 (acknowledging that new rules apply retroactively to cases pending on direct review at the time the rule was established); *Teague*, 109 S.Ct. at 1072-75; *Penry*, slip opinion p. 9 ("This Court's decisions in *Lockett* v. *Ohio*, and *Eddings* v. *Oklahoma*, were rendered before his conviction became final. . . . Under the retroactivity principles adopted in *Griffith* v. *Kentucky*, Penry is entitled to the benefit of those decisions").[10] Thus, because *Edwards* was decided on May 18, 1981, and the South Carolina Supreme Court did not issue its opinion on direct appeal in petitioner's case until February 22, 1982, *Shea* permits no other result than that the "bright-line" rule of *Edwards* applies to this case.

In this respect, petitioner's case is identical to *Yates* v. *Aiken*, *supra*. The question before this Court in *Yates* was whether Yates could claim the benefit of the rule of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), as applied in *Francis* v. *Franklin*, 471 U.S. 307 (1985). *Francis* was

[10] This, of course, is the approach to retroactivity taken in Justice Harlan's seminal opinions on the subject. *See Mackey* v. *United States*, *supra*, 401 U.S. at 689 (Harlan, J.).

decided after Yates' conviction became final on direct review. However, the Court concluded that *Francis* "was merely an application of the principle that governed our decision in *Sandstrom* . . . ." 108 S.Ct. at 538. Therefore, because *Sandstrom* had been decided before Yates' conviction became final on direct review, and because *Francis* was merely a straightforward application of *Sandstrom* to a slightly different sets of facts, the Court held that no genuine retroactivity question was presented in Yates' case. Similarly, because the rule of *Edwards* v. *Arizona* was established before petitioner's conviction became final on direct review, and because *Roberson* was merely an application of *Edwards*, petitioner was entitled to the benefit of both decisions. The Court of Appeals was incorrect in ruling otherwise.[11] *See also Lamp* v. *Farrier*, 763 F.2d 994, 997 n.5 (8th Cir. 1985) (*Edwards* applied to a case tried before *Edwards* but pending on direct appeal at the time *Edwards* was handed down); *accord Flourney* v. *Marshall*, 842 F.2d 875, 878 (6th Cir. 1988); *United States ex rel Adkins* v. *Greer*, 791 F.2d 590, 595 n.3 (7th Cir. 1986); *Greenwalt* v. *Ricketts*, 784 F.2d 1453, 1457 (9th Cir. 1986); *Cervi* v. *Kemp*, 855 F.2d 703, 705 n.9 (11th Cir. 1988).[12]

[11] The order of the Court of Appeals denying rehearing relied exclusively on *Allen* v. *Hardy*, 478 U.S. 255 (1986) (holding that *Batson* v. *Kentucky*, 476 U.S. 79 (1986), did not apply retroactively to cases already final on direct review at the time *Batson* was decided), and *Solem* v. *Stumes*, 465 U.S. 638 (1984) (holding that *Edwards* did not apply retroactively to cases already final on direct review at the time *Edwards* was decided). In its modified order, the Court of Appeals never discussed the applicability of—or even cited—this Court's retroactivity rulings in *Shea* v. *Louisiana* and *Griffith* v. *Kentucky*.

[12] What makes the result reached by the panel in its modified order all the more mystifying is that the panel had previously held that

The Court of Appeals seems to have taken the view that because petitioner's case was before it in a federal habeas corpus proceeding, the proper inquiry was whether *Edwards* was in effect at the time of petitioner's arrest and trial. 864 F.2d at 25; J.A. 135.[13] However, as this Court's decisions reveal, the forum in which a state inmate seeks the benefit of a constitutional decision of the Court is not the touchstone of his rights under that decision. Rather, the applicability of the decision turns on the stage that the inmate's case had reached at the time when the decision was handed down. If the decision was handed down *before the inmate's* case became final on direct

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Edwards did apply retroactively to petitioner's case. In its original decision, the panel noted that the district court had erroneously concluded that *Edwards* was not applicable because it had not been decided at the time of petitioner's trial.

> Unfortunately, the district court's failure to address this claim on the merits must be regarded as error. Although *Edwards* does not have retroactive effect, it does apply to cases pending on direct appeal at the time it was decided. *Shea* v. *Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985). Butler's appeal was in fact pending at that time. We must, therefore, consider whether Butler's interrogation did produce incriminating statements in violation of his right to counsel.

Butler v. *Aiken*, 846 F.2d at 257; J.A. 129. In its order modifying its previous opinion, the panel apparently reversed itself on this issue.

[13] The panel stated:

> The subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the *Edwards* rule as modified in *Roberson*. If this case were before us on direct appeal, we would in all likelihood be compelled to reverse the conviction and remand for a new trial. It does not follow, however, that Butler is entitled to habeas relief based upon a rule of law that was not in effect at the time of his arrest and trial.

Id.

review, he is entitled to its benefit.[14] The Court of Appeals below ignored this well settled point, and its decision, therefore, must be reversed.

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[14] At the risk of belaboring the obvious, petitioner would note that any other conclusion would lead to anomalous results. If the retroactivity of a constitutional rule turned solely on the stage of the proceedings in which the retroactivity question arose, without regard to when the rule was established, a state court could effectively eliminate federal habeas corpus review by the simple expedient of refusing to give effect on direct appeal to new constitutional decisions of this Court. This would essentially give the state courts the power to nullify the decisions and constitutional principles established by the Court, without protecting any legitimate state interest. In short, the rule apparently adopted by the Court of Appeals would effectively turn the Supremacy Clause on its head.

CONCLUSION

Because the result reached by the Court of Appeals is in direct conflict with the applicable holdings of this Court regarding the retroactivity of constitutional decisions, the judgment below should be reversed and petitioner's case should be remanded with instructions to grant the writ of habeas corpus.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

October Term 19[illegible]

HORACE BUTLER,

Petitioner,

vs.

JAMES AIKEN, WARDEN, AND
THE ATTORNEY GENERAL OF
SOUTH CAROLINA, T. TRAVIS
MEDLOCK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

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RESPONDENTS' QUESTIONS PRESENTED

I.

Whether his constitutional claim underlying the proceedings are barred from habeas review where the state court determined the same claim was barred from review based upon a procedural default.

II.

Whether the situation presented where a suspect never requested the assistance of counsel during any interrogation, though counsel had met with the suspect prior to the interrogation, is factually distinguishable from Arizona v. Roberson, __U.S.__, 108 S.Ct. 2093 (1988), and Edwards v. Arizona, 451 U.S. 477 (1981).

III.

Whether Arizona v. Roberson, supra, is to be applied retroactively to cases on federal habeas corpus review at the time the decision was announced?

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 88-6677
October Term 1988

HORACE BUTLER,

Petitioner,

vs

JAMES AIKEN, WARDEN, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA, T. TRAVIS MEDLOCK,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

The Respondents, above named, respectfully submit this Brief of Respondents on Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and would present the following:

CITATION TO OPINIONS BELOW

The opinion of the District Court for the District of South Carolina, Butler v. Aiken, C/A No. 86-1093-3 (D.S.C. June 9, 1987), denying Butler's Petition for a Writ of Habeas Corpus is unreported, and may be found at Joint Appendix (J.A.) pages 91-124. The initial panel opinion of the United States Court of Appeals for the Fourth Circuit, affirming the denial of a Writ of Habeas Corpus, is reported as Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988), and is reproduced at J.A. pages 125-133. The Order of the Court of Appeals denying rehearing and rehearing en banc is unreported. Butler v. Aiken, No. 87-4004 (4th Cir. June 15, 1988). The Order of the United States Court of Appeals for the Fourth Circuit on reconsideration of the Order denying rehearing, and denying rehearing en

banc, concluding that the initial affirmance of the District Court decision was appropriate in substance and denying the Petition for Rehearing and Suggestion for Rehearing En Banc, is reported as Butler v. Aiken, 864 F.2d 24 (4th Cir. 1988), and is reproduced at J.A. pages 134-141.

JURISDICTION

The second Order of the United States Court of Appeals for the Fourth Circuit denying the Petition for Rehearing with Suggestion for Rehearing En Banc was entered December 2, 1988. This Court's jurisdiction is apparently invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ....

STATEMENT OF THE CASE

This matter comes before this Court on federal habeas corpus proceedings arising from a 1981 murder conviction in South Carolina that resulted in a sentence of death on the Petitioner, Horace Butler. The trial involved the July 17, 1980, murder of Pamela Lane in Charleston County, South Carolina.

A. The Crime.

Miss Lane, a clerk at a convenience store, was last seen alive when she left her place of employment at around 10:30 p.m., on July 17, 1980. She was riding home alone for the first time on her new moped she received that day. She never arrived home.

Her sister reported her missing the next day. A few hours later, her body

was discovered by fishermen near a bridge. She had been shot once in the chest by a small calibre pistol. The following day a minister found her moped in a pond near his church.

B. The Arrest and Interrogation.

On August 30, 1980, the Petitioner, Horace Butler, was arrested on an unrelated charge of assault and battery and placed in the County Jail. (J.A. pp. 4-5, 44). He received his "Miranda" warnings on that charge. (J.A. p. 5).

According to post conviction testimony, Butler's sister was called by him and asked to call Mr. Hill or have his father go see Mr. Hill (a local attorney). (J.A. p. 66). Hill was contacted and agreed to be retained on the assault charge and appeared with him at the bond hearing held at the jail at approximately 8:30-9:00 p.m., on August 31. (J.A. pp. 65-67). See also (J.A.

p. 38). He was unable to make bond and he was returned to the County Jail. (J.A. pp. 56-57).

At approximately 12:15 a.m., on September 1, 1980, Butler was taken from the jail and transported to the Charleston County Police Department. He was then informed that he was being charged with the murder of Pamela Lane. After receiving the warnings regarding his constitutional rights as required by Miranda v. Arizona, 384 U.S. 436 (1966) (J.A. pp. 6-19), he stated that he understood his rights and then signed two separate waivers during the interrogation. (J.A. pp. 9-10, 15-16). Sergeant Eugene Frazier meticulously went over the Miranda warnings with the Petitioner. On the issue of whether he understood that he could have a lawyer appointed, Butler initially stated: "Yes sir, Mr. Frazier, but I don't need

no lawyer because I tell you I didn't do no killing." (J.A. p. 7). Sergeant Frazier then further advised him as follows:

> Further, you have a right to have a lawyer here now. In other words, 'if you tell me, Mr. Frazier, yes, I want a lawyer, after I told him he had a right to have one present while we interview him, I says, do you want one now?' And he said, 'Mr. Frazier, I know about the lawyer, but I don't need a lawyer because I didn't did the actual killing ....'

(J.A. p. 7). Butler then gave a verbal statement. Butler then was verbally given the Miranda warnings by Detective Simpson and he signed a written warning form which included the phrase "(3) that I have the right to consult with a lawyer of my choice before I answer any question or give any statement and, also, have him present while I am being questioned; (4) that if I wish to talk to a lawyer or have him present, but am unable to afford or hire a lawyer, one

will be appointed for me free of charge; (5) that if I do decide to answer any question or give a statement without having a lawyer present to represent me, I have the absolute right during this interview to stop answering any questions and remain silent." (J.A. pp. 9-10). Butler then gave a statement admitting knowledge of the murder, but placing the principle blame on Larry White. (J.A. pp. 10-12). This was reduced to writing at 2:55 a.m.

After further discussion about Larry White's statement, Butler then began a third statement after he had been advised of his Miranda warnings again and signed a written waiver form that again listed the warnings. (J.A. pp. 15-16). In this statement, Butler admitted that he had shot Pamela Lane. (J.A. pp. 16-18). After a brief meeting with Larry White, Butler took the police

to the crime scene. (J.A. pp. 22-23). At no time during any interrogation for the Lane murder (or the Kellman assault) did Butler request the presence of any attorney.

Butler offered two explanations of Pamela Lane's death. In his first confession, he claimed that Larry White had killed Lane and sought his help in disposing of the moped. When the police questioned him further, he offered a second confession in which he admitted to killing Lane. According to this statement, he saw Lane riding on her moped and followed her. When he blinked his lights at her, she pulled off the road, hid the moped in the bushes, and voluntarily accompanied him to a nearby wooded area. Butler claimed that Lane engaged in consensual sex with him and said she would "cry rape" when she realized she would get home late.

Butler contended that he panicked, shot Lane with a handgun in his possession, and then dumped her body off a bridge. (J.A. p. 17). He also claimed Larry White helped him dispose of the moped later. After he signed the second confession at 5:45 a.m., he indicated he was not tired and voluntarily led officers to the scenes where he intercepted the victim, where the sexual intercourse and shooting occurred, and where he dumped the body. (J.A. pp. 20-23). He was returned to jail at about 10:30 a.m., on September 1, 1980.

C. The Trial in January, 1981.

He was subsequently indicted and brought to trial on murder and sentenced to death. The confession was introduced in the guilt phase after a suppression hearing. During the suppression hearing, as well as the state version previously mentioned, the defense

presented Isiah Frazier who testified that he was Butler's principal in elementary school and that Butler was sixteen years old when he left school in the fourth grade. He described Butler as having a less than average intelligence level in the range of 85 to 95. (J.A. p. 43). [The Petitioner presented testimony in the state post conviction relief hearing that Butler had an I.Q. of 69. Joint Appendix in Court of Appeals at 1207, 1222]. Butler testified and denied that his counsel had told him not to talk with the police. (J.A. p. 45). He described the interrogation in markedly different terms than the state witness and claimed Sergeant Frazier scared him and struck him. (J.A. pp. 47-48). Sergeant Shuster was also called who testified that "Mr. Hill had made <u>previous</u> visits to Horace Butler ...." (J.A. p. 55).

Officer John Simpson testified and did not recall any conversation with counsel after the bond hearing that Butler was not to speak with anyone about the assault charge. (J.A. pp. 56-57). He denied seeing Butler getting struck by any police officer or hearing verbal threats against his family. (J.A. pp. 57-58). Particularly, the trial court found that Butler was afforded his Fifth Amendment rights required by Miranda and that the statements were "voluntary, they were made without coercion on the part of the law enforcement officers, without any threat, without any promise, without any inducement to the defendant ... beyond any reasonable doubt." (J.A. pp. 63-64).

D. The Appeal.

Butler's conviction and sentence were upheld on direct appeal on February 22, 1982. State v. Butler, 277 S.C.

452, 290 S.E.2d 4 (1982). There was no issue raised in the direct appeal concerning whether he had properly waived his right to counsel under the Federal Constitution, even though Edwards v. Arizona, 451 U.S. 477 (1981), was decided on May 18, 1981, while the appeal was pending. The only issue raised concerning the confession was based entirely on whether a state law was violated by not providing copies of the statements. (J.A. pp. 70, 72). A Petition for Certiorari was denied on October 12, 1982.

E. The State Post Conviction Relief Proceedings.

In 1983, he unsuccessfully pursued state post conviction relief. (J.A. pp. 68-90). In the state post conviction relief proceeding, the state hearing judge concluded that counsel had performed competently in his preparation

of the hearing to suppress the confessions. (J.A. pp. 84-85). Concerning the admissibility of the confession itself, the state court held that it was procedurally barred under Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975), because the court in post conviction relief lacked jurisdiction because it was not a substitute for a direct appeal. (J.A. p. 89).

The Petitioner then filed a Petition for Certiorari from the denial of state post conviction relief to the Supreme Court of South Carolina raising four separate issues, pursuant to Rule 50(9) of Rules of the Supreme Court of South Carolina. He did not raise in the appeal any issue concerning any potential violation of either the Fifth or Sixth Amendment surrounding the admissibility of the confession nor

challenge the hearing court's conclusion that the issue was procedurally barred as a matter of state law. Certiorari was then granted on the sole issue of ineffective assistance of sentencing counsel. State court certiorari was not granted on the remaining three issues concerning the competency of counsel at the guilt phase, the statutory qualifications of counsel, and adequacy of the jury instruction in the penalty phase on the definition of rape. The Supreme Court of South Carolina concluded that the Petitioner received the effective assistance of counsel in the sentencing phase and affirmed the judgment of the hearing court. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), cert. denied, 474 U.S. 1093 (1986).

This Court held in Harris v. Reed, __U.S.__, 109 S.Ct. 1038, 1043 (1989),

that "an adequate and independent finding of procedural default will bar federal review of the federal claim, unless the petitioner can show "cause" for the default and "prejudice" attributable thereto. The state hearing judge, the only state court rendering a judgment on the issue of the confession clearly stated its judgment rested on a state procedural bar. (J.A. p. 89). The Petitioner has not sought to show "cause" for the failure to raise in the direct appeal which was still pending when Edwards v. Arizona, 451 U.S. 477 (1981), was decided. Here, there was no ambiguity as in Harris v. Reed, supra. The plain statement of the state court was the applicability of a state procedural bar. Federal review of this issue should be barred unless the Murray v. Carrier, 477 U.S. 478 (1986), showing of "cause" and "prejudice" is met.

Remand to the lower court is appropriate. Petitioner is presently represented on the Brief by direct appeal counsel, David I. Bruck, who chose not to pursue the issue on direct appeal and state post conviction counsel, Dale T. Cobb, Jr., who chose to abandon the issue in state court after the hearing judge ruled the matter procedurally barred.

F. The Federal Habeas Corpus Proceedings.

On May 2, 1986, Butler filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. This issue, again, was not raised in original pleadings. Although not amending his original Petition, he included in his Memorandum in Opposition to the State's Motion for Summary Judgment a copy of his Memorandum in Support of his State Post Conviction Relief proceeding that

raised the Fifth and Sixth Amendment issue that the State court held to be procedurally barred. (Joint Appendix to the Fourth Circuit, pp. 1527, 1532). The Federal Magistrate in his Report and Recommendation concluded that his Sixth-Amendment right to counsel had not attached on the murder charge and his Fifth Amendment had been validly waived. Particularly, the Magistrate found "no evidence exists that Petitioner ever attempted to exercise his rights." (Joint Appendix to the Fourth Circuit, pp. 1579-1586).

The United States District Court similarly held that the Fifth Amendment right to counsel was validly waived and that his Sixth Amendment right to counsel had not yet attached to the murder charge since no formal proceedings in the prosecution of that charge had been instituted. (J.A. p.

123). The District Court granted the Respondents' Motion for Summary Judgment on all other grounds. (J.A. pp. 91-124).

The panel decision of the United States Court of Appeals for the Fourth Circuit on May 6, 1988, found that the District Court erred in ruling that the mandate in Edwards v. Arizona, supra, did not apply to the Petitioner's case and concluded that it should be applied to the Petitioner's case. Butler v. Aiken, 846 F.2d 255, 257 (4th Cir. 1988). (J.A. p. 129). The panel held that the confessions were not obtained in violation of the Fifth Amendment. Relating to the particular facts of this case, it stated:

> We fail to see how the actions of the Charleston police could fall within the intent of the Court in Edwards .... We see no reason for a different result simply because the custody was continuous.

> Properly initiated interrogation on entirely new charges does not intrude into an accused's previously invoked rights but rather offers that accused an opportunity to weigh his rights intelligently in light of changed circumstances. When, as occurred in this case, the accused then freely waives any constitutional right to counsel and provides voluntary statements of an incriminating nature, there is no justification for undermining the search for truth by suppressing those statements.

Id. at 258-259. (J.A. pp. 131-132).

The Petition for Rehearing and Suggestion for Rehearing En Banc was denied on June 15, 1988. The same day this Court announced its decision in Arizona v. Roberson, __U.S.__, 108 S.Ct. 2093 (1988). The Petitioner made a Motion for Reconsideration. On December 2, 1988, the panel considered the Petition for Rehearing and was of the opinion that it should be denied. Further a majority of the active Court voted to deny rehearing en banc, and it

was adjudged and ordered that the Petition for Rehearing and Suggestion for Rehearing En Banc be denied. (J.A. pp. 134-137). In its December 2, 1988, Order, Judge Hall stated:

> As an initial matter, we reject respondents' effort to distinguish Roberson factually. We assume for purposes of decision that the appearance of counsel with Butler at a bond hearing on the assault charge for which he was arrested conclusively demonstrated invocation of his fifth amendment rights. The subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the Edwards rule as modified in Roberson. If this case were before us on direct appeal, we would in all likelihood be compelled to reverse the conviction and remand for a new trial. It does not follow, however, that Butler is entitled to habeas relief based upon a rule of law that was not in effect at the time of his arrest and trial.

(J.A. p. 135). The Order stated that Butler may not claim any retroactive benefit from Roberson. Relying upon Allen v. Hardy, 478 U.S. 255, 106 S.Ct.

2878, 2880, 92 L.Ed.2d 199 (1986), the Order stated that Petitioner could not benefit from Roberson.

> The Edwards-Roberson limitations on police interrogation have only the most tangential relationship to truth finding. They are, rather, a part of the prophylactic protection accorded the fifth amendment right to counsel as a means of establishing 'guidelines to the law enforcement profession.' Roberson, 56 U.S.L.W. at 4592. The interrogation of appellant, while unquestionably contrary to the present 'guidelines,' was conducted in strict accordance with established law in 1980 [the date of petitioner's arrest]. We, therefore, conclude that Butler may challenge his presumptively valid conviction only by demonstrating that there was an actual violation of his constitutional rights in 1980. On that dispositive issue, the record discloses no support for Butler's claim for habeas relief.

864 F.2d at 25. (J.A. p. 136). This Court granted certiorari on May 1, 1989. (J.A. p. 142).

SUMMARY OF ARGUMENT

The Petitioner's underlying claims under the Fifth and Sixth Amendments should be considered barred because of the state procedural defaults that occurred in the state post conviction proceedings. The state court made a fair statement that it relied on the state procedural bar in dismissing the claim which was not appealed.

Under the facts in this case, the rule of Edwards v. Arizona is inapplicable where the Fifth Amendment right to counsel was not invoked and the Sixth Amendment had not attached to the murder charge. Also, the Petitioner never invoked his right to remain silent or request counsel's presence during any interrogation. Third, counsel was "made available" during the bond hearing in satisfaction of Edwards concerns.

Finally, we submit that Arizona v. Roberson should not be applied to cases final at the time of its decision. It developed new law because it was not dictated from the precedent of Edwards v. Arizona, Maine v. Moulton, and Michigan v. Moseley. It created further a new rule of criminal procedure for law enforcement when dealing with suspects in separate unrelated investigations. Since it does not meet the critical exceptions, the decision should not be given retroactive effect.

ARGUMENT

I.

THE PETITIONER'S FIFTH AND SIXTH AMENDMENT CLAIMS UNDERLYING THE CERTIORARI PROCEEDINGS SHOULD BE CONSIDERED BARRED FROM FEDERAL HABEAS REVIEW BECAUSE OF THE STATE PROCEDURAL DEFAULT FOUND IN THE STATE POST CONVICTION RELIEF PROCEEDINGS.

In the questions presently pending before this Court, the Petitioner raises

the question of whether Arizona v. Roberson, __U.S.__, 108 S.Ct. 2093 (1988), should be retroactively applied to a murder conviction tried in South Carolina in January, 1981. As a threshold matter, the Respondents' review of the record of the presentation of the underlying Fifth and Sixth Amendment claims reveal that even assuming that applicability of Roberson to a conviction presented in the time frame, federal habeas corpus relief should be barred on the basis of a state procedural default.

In Harris v. Reed, __U.S.__, 109 S.Ct. 1038 (1989), this Court held that while the mere fact that a federal habeas corpus claimant failed to abide by a state procedural rule does not prevent the Supreme Court from reaching the federal claim, where the state court actually relied upon a procedural bar as

a basis for the disposition of the case federal habeas review should be barred.

In Wainwright v. Sykes, 433 U.S. 72 (1977), the Court held that an adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show "cause" for the default and "prejudice attributable thereto," Murray v. Carrier, 477 U.S. 478, 485 (1986), or demonstrate that failure to consider the federal claim will result in a "fundamental miscarriage of justice." Id. at 495. Engle v. Isaac, 456 U.S. 107, 135 (1982).

This Court has recently held that a habeas petitioner's state procedural default precludes federal habeas review, like direct review, only if the last state court rendering a judgment in the case rests its judgment on the

procedural default. Harris v. Reed, supra. See Duggar v. Adams, __U.S.__, 109 S.Ct. 1211 (1989); Caldwell v. Mississippi, 472 U.S. 320 (1985). This Court recently focused on the scope purpose of the writ of habeas corpus:

> "[T]he Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error.' Kuhlmann v. Wilson, 477 U.S. 436, 447, 106 S.Ct. 2616, 2623, 91 L.Ed.2d 364 (1986) (plurality opinion). Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review. Thus, if a defendant fails to comply with state procedural rules and is barred from litigating a particular constitutional claim in state court, the claim can be considered on federal habeas only if the defendant shows cause of the default and actual prejudice resulting therefrom. See Wainwright v. Sykes, 433 U.S. at 87-91, 97 S.Ct. at 2506-2509. We have declined to make the application of the procedural default rule dependent on the magnitude of the constitutional claim at issue, see Engle v. Isaac,

> 456 U.S. at 129, 102 S.Ct. at 1572, or on the State's interest in the enforcement of its procedural rule, see Murray v. Carrier, 477 U.S. 478, 493-496, 106 S.Ct. 2639, 2648-2650, 91 L.Ed.2d 397 (1986).

Teague v. Lane, __U.S.__, 109 S.Ct. 1060, 1073-1074 (1989).

The strange procedural history presented in the current case reveals the matter presented before the Court was only raised in the state post conviction relief proceedings. When presented with the issue, the state hearing judge concluded:

> In allegation VII, the Applicant contends that his confession was improperly introduced. This issue has been substantially disposed of in the ineffective assistance of counsel claim. As presented in this allegation, this Court lacks jurisdiction based upon the Supreme Court's mandate in Simmons v. State, supra. [264 S.C. 417, 215 S.E.2d 883 (1975)].

(J.A. p. 89). In Simmons v. State, supra, the Supreme Court of South

Carolina held that a post conviction relief proceeding is not a substitute for an appeal and particularly that "errors in a petitioner's trial which could have been reviewed on appeal may not be asserted or reasserted in post conviction proceedings. 264 S.C. at 423. The stated reliance on this case as depriving the state hearing court of jurisdiction is a "plain statement" finding of a state procedural default where the issue was not raised in the direct appeal.

Furthermore, he chose not to appeal to the State Supreme Court on the post conviction court's conclusion on the issue now being asserted before this Court. Similarly, this failure to appeal the state hearing court's conclusion of a procedural bar as to this issue should act as another bar to federal habeas relief. Whitley v. Bair,

802 F.2d 1487 (4th Cir. 1986); Mason v. Procunier, 748 F.2d 852 (4th Cir. 1984).

Here, the interests of comity would be best served by applying the state procedural bar. The petition for habeas corpus relief sets forth the ground for relief as follows:

> O. Denial of Fifth, Sixth and Fourteenth Amendments rights by failure to the trial judge to rule on the Petitioner's claims that the statement taken from him were the product of free and voluntary waiver.

(Joint Appendix to the Fourth Circuit, p. 1482). The State, in its Motion for Summary Judgment, merely stated that, based upon the record of the trial judge's findings, "his allegation was factually incorrect." (Joint Appendix to the Fourth Circuit, p. 1523). A similar understanding of the allegation in the Petition was found by the District Court. (J.A. pp. 96, 114). The problem presented herein is that the analysis of

the courts below, in obiter dicta, went beyond the allegation in the Petition that was actually before the Court.

It is irrelevant to the allegation presented in the Petition as to whether the State trial judge ruled on the voluntariness of the confession [Jackson v. Denno, 378 U.S. 368 (1964)] on the retroactivity of Arizona v. Roberson, supra. The State, in its Motion for Summary Judgment, stated state remedies had been exhausted to the claims raised in the Petition, which did not include the claims underlying the present matter. Compare Granberry v. Greer, 481 U.S. 129 (1987).

Here, the Petitioner failed to rely upon Edwards v. Arizona, 451 U.S. 477 (1981), in the direct appeal that was decided after the Edwards decision. Further, when the state post conviction

relief court found that there was a procedural bar to the present claim relying upon Simmons v. State, supra, he chose to not raise the issue in his appeal to the South Carolina Supreme Court from the post conviction denial. Further, the allegation is not even raised in the Petition for the Writ of Habeas Corpus filed on May 2, 1986, upon which the Motion for Summary Judgment was made.

This assertion of procedural bar has not been raised previously in these proceedings mainly because the allegation raised in the Petition varied significantly and is not the "same claim," Pitchess v. Davis, 421 U.S. 482 (1975), that is underlying the current presentation of the Petitioner, even though the Petition has never been amended. This Court has previously stated a prevailing party may "defend

its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or Court of Appeal." Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n. 20 (1979). Accord Blum v. Bacon, 457 U.S. 132, 137 n. 5 (1982). We respectfully submit that for the reasons initially stated herein, the judgment of the Court of Appeals should be affirmed or in the alternative that certiorari should be dismissed as being improvidently granted.

II.

EDWARDS v. ARIZONA, 451 U.S. 477 (1981), IS FACTUALLY AND LEGALLY DISTINGUISHABLE FROM THE INSTANT CASE WHERE BUTLER NEVER REQUESTED COUNSEL'S ASSISTANCE DURING ANY INTERROGATION AND HIS RETAINED COUNSEL ON THE ASSAULT CHARGE MET WITH HIM PRIOR TO ANY QUESTIONING ON THE MURDER CASE.

The issue before this Court is not whether the Edwards v. Arizona, supra,

decision would apply to a case tried before the decision and appeal subsequently concluded in the State Supreme Court. The matter has been unequivocally resolved in Shea v. Louisiana, 470 U.S. 51 (1985). Similarly, the Court of Appeals recognized that fact in the decision in the case where it recognized that the Edwards decision does apply to cases pending on direct appeal at the time it was announced. (J.A. p. 129). It will be argued subsequently in the Brief that the later decision of this Court in Arizona v. Roberson, __U.S.__, 108 S.Ct. 2093 (1988), does not have retroactive application to cases pending on collateral review.

An alternative ground exists in the record that distinguished Edwards, supra, and also Roberson, supra, from the instant case. This Court has

recognized that a prevailing party may defend its judgment on any ground properly raised below. Washington v. Yakima Indian Nation, supra. We would submit for the reasons set forth herein that the judgment below should be affirmed.

The critical facts of the case more fully set out in the Statement can be summarized for pertinent purposes to this Argument. Butler was arrested on an unrelated assault charge and placed in custody in the Charleston County Jail. He was advised of his Miranda rights during questioning on that charge. He appeared at a bond hearing on August 31, 1980, where he was assisted by retained counsel o the assault charge. He was returned to jail after failing to make bond. That same night, he was transported from the jail to the police department where he was informed

by the police that he was to be charged in the murder of Pamela Lane. The officers went over the Miranda warnings orally and the Petitioner twice responded that he knew about the lawyer, but did not need a lawyer because he did not do the actual killing. (J.A. p. 7). The Petitioner then signed a written waiver of the same rights that he read out loud. (J.A. pp. 9-10). A statement was given admitting some involvement in the case. After further interrogation, another series of Miranda warnings were given orally and in writing. (J.A. pp. 15-16). Butler then gave a written statement admitting greater involvement in the murder. (J.A. pp. 16-17). Butler then voluntarily went with the officers to the crime scene. (J.A. p. 20). As the Court of Appeals found, at no time during the interrogation did Butler request the presence of an attorney.

In Edwards v. Arizona, supra, the Court held under the Fifth Amendment once an accused has invoked the right to have counsel present during a custodial interrogation, further interrogation must cease until counsel has been made available, unless the accused initiates further conversation with the police. 451 U.S. 477, 484-485. Central to the holding in Edwards was the fact that after the accused asserted his right to have counsel present during questioning, the police resumed the interrogation without giving Edwards access to an attorney. Under such circumstances, the Court concluded that additional safeguards were necessary before an accused may validly waive the right to counsel. Edwards, 451 U.S. at 484.

We submit that the Petitioner's analysis of Edwards is inapplicable to the present situation. First, he has

overlooked the significant difference between the Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination. Second, Butler never invoked his right to remain silent or have counsel present during any questioning. Third, unlike Edwards, counsel was "made available" during the bond hearing.

A. The Relationship between the Fifth and Sixth Amendments.

In the argument in the Court of Appeals, the Petitioner relied heavily upon the reasoning of the Seventh Circuit in U.S. ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir. 1987). In Espinoza, the court, citing Michigan v. Jackson, 475 U.S. 625 (1986), held that individuals who invoke their right to counsel at an arraignment are deemed to have invoked both their Fifth and Sixth Amendment rights. Espinoza, 813

F.2d at 123. Respondents asserted below that Petitioner's reliance on Jackson, supra, is misplaced and would assert that this Court has not adopted that approach and should not do so.

In Michigan v. Jackson, supra, the Court held only that the Sixth Amendment right to the assistance of counsel guarantees that right at post-arraignment interrogations, because such interrogations represent "critical stages" of adversary judicial proceedings to which the Sixth Amendment applies. Jackson, 475 U.S. at 629-630. From this, the Court reasoned that a defendant's invocation of his Sixth Amendment right to counsel at post-arraignment interrogations is as much protected as is the Fifth Amendment right to counsel at a custodial interrogation. Jackson, 475 U.S. at 632.

The court in Jackson merely extended the rule of Edwards to Sixth Amendment invocations of the right to counsel; it did not hold that the invocation of a Sixth Amendment right to counsel at an arraignment also invokes a defendant's Fifth Amendment rights. Jackson, 475 at 636 n. 10. In Rhode Island v. Innis, 446 U.S. 291 (1980), the Court stated that the Fifth Amendment right to counsel attaches only to custodial interrogations. Accordingly, a bond hearing likewise does not implicate a defendant's Fifth Amendment right as it involves no compulsion of the accused to give evidence having a testimonial significance. See Kirby v. Illinois, 406 U.S. 682 (1972) (Fifth Amendment not implicated in a lineup).

A bond hearing has not been held to be a "critical" stage of the criminal

proceeding by this Court requiring the defendant the right to be represented by counsel nor is it an adversarial judicial proceeding. U.S. v. Gouveia, 467 U.S. 180 (1984).

Because no Fifth or Sixth Amendment right to counsel attached at the bond hearing, Butler's representation by retained counsel at that hearing on the assault charge must be viewed as only invoking a Sixth Amendment right to counsel on the assault charge. The significance of the distinction between the invocation of the Sixth Amendment as opposed to the Fifth Amendment is that the scope of the rights invoked differ. The Sixth Amendment right to counsel is limited to the specific crimes for which the state has begun prosecution (here, the assault charge); whereas Fifth Amendment rights, once invoked, extend to any subsequent interrogation.

Edwards, supra; Roberson, supra. Accord, Moran v. Burbine, 475 U.S. 412, 431 (1986); Maine v. Moulton, 474 U.S. 159, 180 n. 16 (1985). Here, the Sixth Amendment rights had not attached to the murder charge for no proceedings of any nature occurred concerning that charge at the bond hearing or questioning on that charge. Consequently, Butler's retention of counsel under the Sixth Amendment for the assault charge did not extend to the murder charge. Accordingly, Butler's multiple waivers of his Miranda rights as to the murder should not be rendered invalid under the Edwards rule, as no right to counsel under the Fifth Amendment had been previously invoked by the defendant to these charges to bring Edwards into play.

A. The Failure to Request Counsel at Any Interrogation.

Secondly, even if Butler is deemed to have invoked his Fifth Amendment right to counsel, he did not invoke it in the context of a custodial interrogation; therefore, the rationale of Edwards and also Roberson do not exist. In Roberson, the Court was concerned with the discomfort with the pressures of custodial interrogation continuing after counsel was requested to assist in the interrogation. Roberson, supra, 108 S.Ct. 2099. In contrast, the assistance of retained counsel without ever requesting such assistance during any interrogation before or after, tells us nothing about the defendant's belief as to his ability to deal with the pressures of custodial interrogation. Even if deemed invoked at the bond hearing, there would still not be a justification for extending the protection of that right to subsequent

police questioning of unrelated crimes. See U.S. v. Roberts, 869 F.2d 70 (2nd Cir. 1989); State v. Norris, 768 P.2d 296 (Kan. 1989).

Here, in light of the wholly voluntary and non-coercive circumstances surrounding the defendant's statements, there is no constitutional objective to be served by suppression. Accord Connecticut v. Barrett, 479 U.S. 523 (1987). The purpose of Miranda, "to insulate the exercise of Fifth Amendment rights from the government compulsion, subtle or otherwise" was not present. Id. at 527. Presence of retained counsel at a bond hearing does not raise a presumption that the defendant is unable to deal with custodial interrogations. The Petitioner never sought counsel's assistance during any interrogation when advised of his right

to so request. The judgment below could be affirmed for this reason.

C. Counsel was "made available" to Butler.

In Edwards, supra, the court held that a suspect who has "expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. 451 U.S. 477, 484-485. Here, after the bond hearing where retained counsel on the assault charge was present, and we submit met with counsel, the Petitioner after successive Miranda warnings orally waived the assistance of any counsel and proceeded to give a statement. Unlike Edwards, Roberson, or Michigan v. Jackson, supra, in which

counsel was requested but not seen, the Petitioner here had counsel with him during the bond hearing. Simply put, counsel was "made available." Edwards emphasized the necessity of making counsel "available" or of the defendant having "access" to counsel, Edwards, supra, 451 U.S. 484-487, rather than holding that once the accused requests counsel he may thereafter be questioned only in the presence of counsel. See U.S. v. Missler, 414 F.2d 1293 (4th Cir. 1969) (after indictment on a different charge, defendant's incriminating statements made out of counsel's presence did not preclude admission of statement in prosecution for new crime committed after the earlier indictment). In U.S. v. Halliday, 658 F.2d 1103 (6th Cir. 1981), the court held the Fifth Amendment was not violated when counsel was "made available" after a request for

counsel under Edwards. Also, the United States Supreme Court in Wyrick v. Fields, 459 U.S. 42 (1982) (per curiam), the Court limited Edwards to the extent that its language was interpreted to not require the "presence" of counsel at an interrogation after he had met with counsel. Cf. Roper v. State, 375 S.E.2d 600 (Ga. 1989). Cervi v. Kemp, 855 F.2d 702 (11th Cir. 1988).

Similarly,in Boles v. Foltz, 816 F.2d 1132 (6th Cir. 1987), the Court rejected a Fifth Amendment challenge where a defendant advised the trial court at an arraignment that he had a lawyer and desired him to appear at a preliminary hearing on a larceny charge, but never sought to have him present during any interrogation on the other charges. The Sixth Circuit relied upon Connecticut v. Barratt, 479 U.S. 523 (1987). In Barratt, where a defendant

stated he was willing to give an oral statement but would not give a written statement unless his attorney was present, it held he invoked his right to counsel for purposes of the interrogation. In Boles, however, the Court found that he did not invoke his right to have counsel present during an interrogation where his statement at the arraignment was that he wished to have his attorney present at the preliminary hearing.

Further, the lower courts have held where the accused had a "reasonable opportunity" to consult with counsel, such as a break in custody after the request was made. Dunkins v. Thigpen, 854 F.2d 394, 397 (11th Cir. 1988); U.S. v. Skinner, 667 F.2d 1306, 1309 (9th Cir. 1982); State v. Norris, 768 P.2d 296 (Kan. 1989); State v. Fetterly, 766 P.2d 701 (Idaho 1988). In Fetterly, the

state court held that counsel was appointed and the defendant had benefit of him while released on bail. The court reasoned that when he was later arrested for murder, he was familiar with his rights and aware counsel could be appointed on the new charge and "in no way disabled or coerced into waiving his rights." 766 P.2d at 704 n. 2.

In Griffin v. Lynaugh, 823 F.2d 856 (5th Cir. 1987), it was held that a suspect's request to speak to a particular attorney was not an invocation of a general right to counsel where the police honored the request and resumed the interrogation only after he had spoken with the attorney. It is important in Griffin that the police sought to assure that his request had been fully honored by inquiring whether he wished to talk to any other attorney. He stated he did not wish to speak to

another attorney at that time and questioning resumed and Miranda rights waived. In that situation as here: there is no constitutional objective that could be served by suppression. Accord Connecticut v. Barratt, supra.

Similarly, in Commonwealth v. Santiago, 545 A.2d 316 (Pa. Super. 1988), the state court found Edwards not to be controlling in a situation where the accused exercised his rights and counsel was immediately made available to him. Importantly, however, the police officers did not seek to interview the defendant until after he had consulted with an attorney. 545 A.2d at 320.

In each of the above cases, the concerns of the Fifth Amendment right to have counsel's assistance during a custodial interrogation were satisfied when counsel was made available or

circumstances occurred such as a break in custody with appointment of counsel that created a "reasonable opportunity" to consult with counsel. As previously stated in the earlier arguments, the concerns of coercion or discomfort that Edwards suggests are not present under these facts. Here, counsel met and talked with Butler at the bond hearing. When contacted about the new charge he stated he did not want any lawyer on numerous occasions and never asked to see his retained counsel or to see appointed counsel during the interrogation. Simply put, the record is clear that counsel was "made available" for the purpose he desired, the bond hearing on the unrelated assault charge, and the Petitioner did not desire to involve him during the interrogation when given the

opportunity. Edwards was satisfied by these facts.

In summary, Arizona v. Roberson should not affect this case because Horace Butler never invoked his Fifth Amendment right by requesting counsel to assist in any interrogation. Counsel merely appeared with his client at an unrelated bond hearing and consulted, although the information exchanged during the consultation has varied in the various proceedings. Since no Sixth Amendment right had attached on the murder charges and the Petitioner never sought to have counsel "made available" after his consultation after the bond hearing, we submit that the mandate of Roberson and Edwards has not been violated. Therefore, we submit that the Writ of Habeas Corpus was properly dismissed and denied because the Petitioner's constitutional rights were

not infringed and certiorari should be denied.

III.

ASSUMING THAT ROBERSON FACTUALLY APPLIES TO THE SITUATION, THE FOURTH CIRCUIT CORRECTLY STATED IN ITS ORDER, SUA SPONTE, THAT IT DOES NOT HAVE RETROACTIVE APPLICATION.

In its Order of December 3, 1988, denying the Petition for Rehearing and Suggestion for Rehearing En Banc, Judge Hall stated that "we are fully satisfied that Butler may not claim any retroactive benefit from Roberson." The Order concluded that the interrogation was conducted in strict accordance with established law in 1980, and that there was no support that there was an "actual violation of his constitutional rights in 1980." (J.A. p. 136). As the Order stated:

> It is undisputed that local authorities provided full Miranda warnings before questioning Butler on the Lane murder.

> It is further undisputed that Butler twice evidenced his knowing consent to interrogation without the presence of counsel by executing signed waivers. Every court that has considered this matter has concluded that the waiver of rights was uncoerced and utterly voluntary. There is, therefore, no reason to find a technical violation based upon newly announced law when the record reveals that the appellant freely waived any fifth amendment protections in 1980.

(J.A. p. 136). The Order of the Fourth Circuit reflects its sua sponte determination that the decision in Arizona v. Roberson, supra, established new guidelines for law enforcement and did not have more than the most tangential relationship to truth finding.

This Court has recently looked at retroactivity in its decision in Teague v. Lane, __U.S.__, 109 S.Ct. 1060 (1989). Justice O'Connor wrote that in habeas corpus the issue of retroactivity should be a threshold question "for,

once a new rule is applied to the defendant in the case announcing the rule, even-handed justice requires that it be applied retroactively to all those similarly situated." Id. at 1069-1070. In her opinion, a new rule for retroactivity purposes is when it breaks new ground or imposes a new obligation on state or federal Government. "To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Id. at 1070, citing Truesdale v. Aiken, 480 U.S. 527, 528-529 (1987) (Powell, J., dissenting).

In the habeas corpus context, Justice O'Connor's analysis adopted Justice Harlan's view of retroactivity set forth in Mackey v. U.S., 401 U.S. 667, 675 (1971), for cases on collateral review. Particularly, the opinion

recognized the frustration of state courts to faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands. In Teague, two exceptions to the general rule on nonretroactivity were stated:

> (1) a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe;" and
>
> (2) a new rule should be applied retroactively if it requires the observance of "those procedures that ... are implicit in the concept of ordered liberty."

In Penry v. Lynaugh, __U.S.__, No. 87-6177 (June 26, 1989), the court relied upon the Teague analysis and concluded that the finality concerns underlying Justice Harlan's approach are applicable in the capital sentencing context, as are the two exceptions to

his general rule or nonretroactivity set out above.

As indicated in both Teague and Penry, the Court must initially determine whether granting him the relief he seeks would create a "new rule." The suggestion here is better put whether this Court's decision in Arizona v. Roberson, supra, created a "new rule."

On the issue of whether a matter would be a "new rule," the Court stated:

> Justice Harlan recognized the inevitable difficulties that will arise in attempting to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law. Mackey, supra, at 695. [Citations omitted].

Penry, supra. Application of constitutional rules not in existence at the time a conviction became final

seriously undermines the principle of finality which is essential to the operation of the criminal justice system. The Court in Teague, supra, 109 S.Ct. 1075, further recognized that "state courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover during a habeas proceeding new constitutional commands."

In U.S. v. Johnson, 457 U.S. 537, 549 (1982), the Court stated:

> When a decision of this Court merely has applied settled precedents to new and different factual situations, no real questions of retroactivity has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.

Similarly, in Yates v. Aiken, 484 U.S. 211 (1988), the Court held that the rule of Francis v. Franklin, 471 U.S. 307

(1985), did not announce a new rule because it "was merely an application of the principle that governed our decision in Sandstrom v. Montana, 442 U.S. 510 (1979), which had been decided before the defendant's trial took place."

The question raised in this proceeding is whether the rule of Arizona v. Roberson, supra, is a new rule or is it merely an application of the principle that governed this Court's decision in Edwards v. Arizona, supra. Stated another way, did Roberson announce a new rule that was not dictated by precedent existing at the time of the conviction. The Petitioner contends that Roberson was not a new rule but merely applied Edwards.

In Edwards, the defendant was arrested on various charges including murder. He submitted to interrogation initially but then requested an

attorney. Questioning ceased, but two detectives came to the jail the next morning and a guard advised them to talk with Edwards. He waived his right to silence and implicated himself. The Court reversed holding that an accused who expresses his desire to face further questioning with counsel present will not be subject to further interrogation until counsel is made available unless he initiates it. The Court therein was concerned with the accused's understanding of his rights and his willingness to waive them free of coercion.

The focus of Edwards was to protect an accused in custody from being badgered into confessing to the crime he had been interrogated upon. Subsequent questioning about a different and independent investigation presents

little risk of the same concept of police badgering.

Far different from the focus of Edwards, the rule announced in Arizona v. Roberson, supra, focused on two separate investigations. The only similarity was continuous custody and that counsel had not been made available. As the dissent reasoned in Roberson,

> It is a frequent occurrence that the suspect is wanted for questioning for other crimes unrelated to the one for which he has been apprehended. The rule announced today will bar law enforcement officials, even those from some other city or other jurisdiction from questioning a suspect about an unrelated matter if he is in custody and has requested counsel to assist in answering the questions put to him about the crime for which he was arrested.

Roberson, supra, 108 S.Ct. 2102 (Kennedy, J., dissenting).

The Roberson decision was the first to apply the bright line rule to

separate investigation. To the contrary, in Maine v. Moulton, supra, the court was careful to note under a Sixth Amendment analysis that while evidence that related to invoked charge would not be admissible, the evidence pertaining to the charges to which the Sixth Amendment right had not attached would be admissible. Accord Michigan v. Moseley, 423 U.S. 96 (1975). While admittedly not controlling in the context presented, these cases indicate a clear difference concerning separate investigations. An analysis of those cases clearly reveals the result in Roberson was not dictated by Edwards. The analysis instead reveals that it should more properly be styled an extension of Edwards to separate investigations.

Here, the Order below determined that the rule of Arizona v. Roberson

announced a new rule by setting new guidelines for law enforcement officers by requiring the preclusion of any interrogation on unrelated conduct after a suspect in custody had invoked his right to counsel on the subject of his custody. (J.A. p. 136). The Supreme Court had never addressed that setting although some other state courts had held that it was not a constitutional violation. State v. Dampier, 314 N.C. 292, 333 S.E.2d 230 (1985); McFadden v. Commonwealth, 300 S.E.2d 924 (Va. 1983); Lofton v. State, 471 S.E.2d 1294 (Fla. App. 1985); State v. Newton, 682 P.2d 295 (Utah 1984). Roberson, supra, 108 S.Ct. 2093, 2097, n. 3. As Roberson acknowledged, the statements deemed inadmissible in Edwards and later cases applying its doctrine were statements relating to the same investigation in which the right to counsel was invoked.

Roberson, supra, at 2102. Here, the new rule of Roberson was the first opinion to apply it to separate investigations which is as much a new rule of criminal procedure as the Edwards decision was when it was decided. Solem v. Stumes, 465 U.S. 638 (1984).

The Petitioner contends that the lower court did not apply Edwards retroactively. We disagree. As stated in the panel decision, the Fourth Circuit unequivocally applied Edwards to the Butler situation. (J.A. p. 129). The Court, in reconsideration of the Petition for Rehearing, stated that it would not apply the mandate of this Court's decision in Roberson to the Butler setting. (J.A. pp. 134-137).

Since Roberson established new guidelines for law enforcement, we submit that it should not be applied to collateral review since it does not fall

within the two exceptions set forth in Justice O'Connor's opinion in Teague. Application of the rule in Roberson would not accord constitutional protection to any primary, private individual conduct nor create the watershed rule of criminal procedure Mackey, supra, was concerned with. Here, the suspect received oral warnings pursuant to Miranda and signed two written waivers of his constitutional rights, including his right to have counsel appointed or assist in the interrogation. In this record, at no time did he ever request counsel to assist the interrogation for this crime or the unrelated crime he was in custody for before or during the interrogation. Simply put, this case does not present the concerns of "badgering" or coerciveness that Roberson was concerned with remedying. Now, almost nine years

after the interrogations, the Petitioner seeks to have a technical change applied to him where the evidence is undisputed that he waived his right to have the assistance of counsel.

CONCLUSION

For all of the foregoing reasons, we submit that the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed or certiorari dismissed. Should the Court find that Roberson should be retroactively applied, remand on the merits of the Roberson claim to the Court of Appeals may also be appropriate.

Respectfully submitted,
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August 11, 1989

IN THE
SUPREME COURT OF THE UNITED STATES

No. 88-6677
October Term 1988

HORACE BUTLER,

Petitioner,

vs

JAMES AIKEN, WARDEN, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA, T. TRAVIS MEDLOCK,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Brief of Respondents on the Petitioner by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to John H. Blume, Esquire, South Carolina Death Penalty Resource Center, Post Office Box 11311, Columbia, South Carolina 29211. He further certifies that all parties required to be served have been served.

This 11th day of August, 1989.

Donald J. Zelenka

SWORN to before me this

11th day of August, 1989.

Melvin Gergel (LS)
Notary Public for South Carolina
My Commission Expires: July 1993.

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AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and forty copies of Brief of Respondents in the above captioned case by depositing same with Emery & Purolator Worldwide Courier & Cargo, prepaid, and properly addressed to the Clerk of this Court.

This 11th day of August, 1989.

Donald J. Zelenka

SWORN to before me this
11th day of August, 1989.

(LS)
Notary Public for South Carolina
My Commission Expires: July 19, 93

Supreme Court, U.S.
FILED
OCT 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

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KENNETH D. MCKELLAR, Warden, et al.

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

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ARGUMENT IN REPLY

I. PETITIONER'S *EDWARDS-ROBERSON* CLAIM IS NOT PROCEDURALLY DEFAULTED.

1. There Was No Procedural Default In The State Courts.

Respondents assert that the state post-conviction court found that petitioner's *Edwards-Roberson* claim was procedurally barred. Respondents' Brief at 28-29. Respondents' contention is based entirely on one paragraph in the state post-conviction court's order in petitioner's case. The relevant portion of the order is as follows:

> In allegation VII, the Applicant contends that his confession was improperly introduced. This issue has been substantially disposed of in the ineffective assistance of counsel claim. As presented in this allegation, this Court lacks jurisdiction based upon the Supreme Court's mandate in *Simmons* v. *State*, *supra*. For the reasons set out previously, this allegation is without merit and is dismissed.

J.A. 89. Respondents interpret this excerpt from the post-conviction court's order to mean that petitioner's claim was procedurally barred because it was not raised on direct appeal. Respondents' brief at 29. For the reasons that follow, respondents' assertions are meritless.

Respondents rely on *Simmons* v. *State*, 264 S.C. 417, 215 S.E. 2d 883 (1975), as establishing the state rule of procedure which petitioner transgressed, i.e., that claims which are not raised on direct appeal may not subsequently be raised in post-conviction proceedings. Respondents' argument, however, is based on an incorrect reading of the South Carolina Supreme Court's *Simmons* decision. In fact, *Simmons* applies to several categories of claims, and holds that "errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." 264 S.C. at 419, 215 S.E. at 885. Thus, the

post-conviction court's citation of *Simmons* does not necessarily mean that it found petitioner's *Edwards-Roberson* claim to be defaulted. Rather, it could mean that the claim was addressed on direct appeal and thus cannot be reasserted in collateral proceedings, or that it was not presented or considered at all. To properly determine the meaning of the state court's reference to *Simmons* in petitioner's case, it is necessary to examine the law of procedural default in South Carolina as it is applied in capital cases.

In cases in which a defendant is sentenced to death, the South Carolina Supreme Court, for over a hundred years, has taken upon itself the obligation of reviewing the entire record to determine whether there was any prejudicial error. *See, e.g., State* v. *McNinch*, 12 S.C. 89 (1879); *State* v. *Diddlemeyer*, 296 S.C. 235, 238, n.1, 371 S.E.2d 79 (1988). This doctrine is referred to in South Carolina as *in favorem vitae*. *Id.* Pursuant to *in favorem vitae*, the failure to raise a claim either at trial or on direct appeal does not create a procedural default. *See, e.g., State* v. *Brown*, 296 S.C. 191, 192, 371 S.E.2d 523, 524 (1988); *State* v. *Cockerham*, 294 S.C. 380, 365 S.E.2d 22 (1988); *State* v. *Riddle*, 291 S.C. 232, 235, 353 S.E.2d 138, 140 (1987); *State* v. *Pierce*, 289 S.C. 430, 435, 346 S.E.2d 707, 710 (1986); *State* v. *Drayton*, 287 S.C. 226, 228, 337 S.E.2d 216, 217 (1985); *State* v. *Peterson*, 287 S.C. 244, 246, 335 S.E. 2d 800, 801 (1985), *State* v. *(James) Butler*, 277 S.C. 543, 546, 290 S.E.2d 420, 421 (1982), *State* v. *Adams*, 277 S.C. 115, 119, 283 S.E.2d 582, 584 (1981). In fact, the South Carolina Supreme Court has reversed capital convictions and death sentences on grounds not raised by the appellants at any stage of the trial or appellate process. *See State* v. *Patterson*, 278 S.C. 319, 320-321, 295 S.E.2d 264, 264-65 (1982); *State* v. *Gilbert*, 273 S.C. 690, 695-696, 258 S.E.2d 890, 894 (1979).

Furthermore, the South Carolina Supreme Court has reversed death sentences on the basis of claims raised for the first time in the collateral proceedings. In *Thompson* v. *Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984), for example, the South Carolina Supreme Court granted post-conviction relief on the basis of a claim of improper prosecution jury argument which was raised for the first time on collateral attack after the death sentence had become final on direct appeal. *See also Yates* v. *Aiken*, 290 S.C. 232, 234, 349 S.E.2d 84 (1986), *rev'd* 484 U.S. 211 (1988).[1]

Thus, in this context, the post-conviction court's reliance on *Simmons* must mean that petitioner's Fifth and Sixth Amendment claims were addressed by the South Carolina Supreme Court when it reviewed the record *in favorem vitae* and affirmed his conviction and sentence of death, and, therefore, that the claims could not be "re-raised" during the post-conviction process.[2] This is

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[1] Respondents' counsel in this case advanced a similar and equally meritless procedural default argument, again for the first time in this Court, in his brief in *Yates* v. *Aiken*, *supra*. In *Yates*, as here, the petitioner had not raised his constitutional claim either at trial or on direct appeal, but rather asserted it for the first time in collateral proceedings. *See Yates* v. *Aiken*, 290 S.C. at 234, 349 S.E.2d at 86. In *Yates*, as here, the state attorney general attempted to assert a nonexistent state rule of procedural default in order to convince this Court that it should not reach the question which it had granted certiorari to consider. *Yates* v. *Aiken*, *supra*, Brief of Respondents. The Court unanimously rejected the Attorney General's procedural argument in *Yates*, 484 U.S. 211 (1988), and his present argument is no more meritorious.

[2] The South Carolina Attorney General has adopted precisely this

shown by the fact that in the sections preceding the discussion of petitioner's Fifth and Sixth Amendment claim, the state post-conviction court, again relying on *Simmons* v. *State*, *supra*,[3] found in relation to another issue raised by petitioner, that because the Supreme Court of South Carolina had reviewed the "'entire record for any prejudicial error and [found] none,'" the matter could not be "reasserted in these proceedings which are not a substitute for an appeal." J.A. 89. The court made this same statement in petitioner's case, with reference to *Simmons*, in regard to claims which were not raised at all on direct appeal, claims which were raised by formal exception but not briefed,[4] and claims which were raised on

position in other cases. For example, in *Owens* v. *McKellar*, No. 88-CP-26-605 (Horry County Court of Common Pleas, Order filed April 10, 1989), a case involving a post-conviction claim that a death-sentence inmate's appellate counsel had been ineffective by failing to raise certain trial errors on direct appeal to the South Carolina Supreme Court, the Attorney General successfully argued that appellate counsel because the South Carolina Supreme Court, pursuant to its *in favorem vitae* review in all capital cases, had necessarily addressed and implicitly rejected the claims at issue when the defendant's case was before it on direct appeal. *See id.*, Respondents' Trial Brief at 65, 99-102.

[3] *Simmons*, *supra*, was not a capital case and thus did not involve the ramifications of the South Carolina Supreme Court's *in favorem vitae* doctrine as to issues raised for the first time in collateral proceedings. In cases in which the death penalty is not imposed—even cases where the state seeks the death penalty but a sentence of life imprisonment is returned—the South Carolina Supreme Court rigorously enforces state rules of procedure, including a contemporaneous objection rule. *See, e.g.*, *State* v. *Sosebee*, 284 S.C. 411, 326 S.E.2d 654 (1985).

[4] In a non-capital case in South Carolina, the failure to raise a claim in the appellant's brief that is included in the appellant's proposed case and exceptions—the pleading under state law that sets out the

direct appeal and raised again in Butler's application for post-conviction relief. J.A. 88-89. Thus the order in its entirety makes clear that the court did not find that petitioner's claim was defaulted.[5]

Even if the lack of a state procedural bar were not as clear as it is on these facts, the post-conviction court's order is certainly ambiguous as to whether it determined that there was a procedural default in petitioner's case. Because the relevant portion of the order standing alone could mean that the *Edwards-Roberson* claim was consid-

issues which will be raised in the brief—creates a procedural default. *See, e.g.*, *State* v. *Vaughn*, 268 S.C. 119, 232 S.E.2d. 328 (1977). However, like other procedural rules, this requirement is relaxed in capital cases. *See, e.g.*, *State* v. *Brown*, *supra*; *State* v. *Patterson*, *supra*.

[5] Furthermore, even had the state court determined that the claim was procedurally defaulted, the holding could not stand. In *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958), this Court realized that a new rule of procedure cannot be established and used to an individual's detriment for the first time in his case. The Court noted: "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Id.* at 457-58; *see also NAACP* v. *Alabama ex. rel. Flowers*, 377 U.S. 288, 301 (1964); *Wright* v. *Georgia*, 373 U.S. 284, 290-91 (1963). Similarly, a procedural default ruling in petitioner's case could not satisfy this Court's requirement that the state procedural rule relied on by the state court be consistently and regularly applied, as similar claims are routinely addressed on the merits in state post-conviction proceedings in South Carolina capital cases. *See Johnson* v. *Mississippi*, 486 U.S. ____, 108 S.Ct. 1981 (1988). Thus, even assuming the state post-conviction court found the claim to be procedurally defaulted—which it did not—this holding would not be in accordance with a "strictly or regularly followed" state procedural requirement. *See Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964).

ered and rejected on the merits by the South Carolina Supreme Court on direct review, or that it could not be addressed because it was not raised, it is, at the very least, uncertain whether "the state court . . . actually relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell* v. *Mississippi*, 472 U.S. 320, 327 (1985). This is, by definition, the type of ambiguous state court holding that fails to satisfy the "plain statement" requirement of *Harris* v. *Reed*, ___ U.S. ___, 109 S.Ct. 1038, 1044-45 (1989) (holding that state court must clearly and explicitly rely on any available state law procedural ground, and that if the decision of the state court does not contain such a "plain statement," then a federal court must address the merits of the claim).

Finally, not only did the state court not find petitioner's claim to be procedurally defaulted, it also addressed petitioner's claim on its merits. In the portion of the order relied upon by respondents, the court determined that petitioner's *Edwards-Roberson* claim "has been substantially disposed of in the ineffective assistance of counsel claim." J.A. 89. During its consideration of petitioner's allegations of ineffective assistance of counsel, the court found that petitioner's confession was not obtained in violation of South Carolina law or the United States Constitution. J.A. 84-85. Based on this disposition of petitioner's arguments, the court specifically stated, in regard to petitioner's substantive challenge to the admissibility of his statements: "[f]or the reasons set out previously, this allegation is without merit and is dismissed." J.A. 89. This is a ruling on the merits of petitioner's claim.

2. Respondent's Cannot Assert At This Point In The Proceedings That Petitioner's *Edwards-Roberson* Claim Is Procedurally Barred.

In the three and one-half years this case has been pending in the federal courts, respondents have never before raised any procedural defense. Had respondents sincerely believed that petitioner's *Edwards-Roberson* Claim was procedurally barred, they would surely have raised this defense before the magistrate, the district court, the Court of Appeals, or in their brief in opposition to the petition for writ of certiorari. They did not. Had they done so before lower federal courts familiar with South Carolina law and with habeas corpus proceedings involving South Carolina death-sentenced inmates, those courts would have immediately perceived the patent lack of merit in respondents' argument. *See generally Granberry* v. *Greer*, 481 U.S. 129, 136 n.9 (1987).[6] Furthermore, it ill serves justice to withhold such a procedural defense until a case has arrived before the court least familiar with the pertinent details of state procedure. That is part of the

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[6] Death sentenced inmates routinely raise, and have addressed on the merits in collateral proceedings in the state and federal courts, issues which were not raised at trial or on direct appeal, but were raised for the first time in post-conviction proceedings. *See, e.g., Hyman* v. *Aiken*, 777 F.2d 938 (4th Cir. 1985), *vacated and remanded*, 478 U.S. 1016 (1986), *relief granted* 824 F.2d 1405 (4th Cir. 1987) (*Enmund* v. *Florida*, 458 U.S. 782 (1982), claim raised for the first time in collateral proceedings); *Adams* v. *Aiken*, 3:86-1499-6(B) (D.S.C. Feb. 22, 1989); *Gilbert* v. *Aiken*, C.A. No. 2: 84-3792-2(H) (D.S.C. June 29, 1989). In fact, no federal court in the District of South Carolina or panel of the United States Court of Appeals for the Fourth Circuit has *ever* found a claim to be procedurally defaulted because it was not raised at trial or on direct appeal in a South Carolina capital case.

reason why all litigants—the state included—are obligated to raise any defenses they believe to be meritorious, and on which they intend to rely, at the earliest opportunity. The state's failure to do so may—and under the facts of this case should—result in the waiver of these defenses. *See, e.g., Granberry* v. *Greer*, 481 U.S. at 134; *Illinois* v. *Gates*, 462 U.S. 213, 221 (1983).[7]

Recognizing the difficulty in raising this defense, such as it is, in this Court for the first time, respondents assert in their brief that they have not previously asserted a procedural bar because the *Edwards-Roberson* claim was not expressly pleaded in the petition for writ of habeas corpus. Because of this purported defect in the original pleading, respondents assert that the discussion of petitioner's *Edwards-Roberson* claim by the magistrate, the federal district court, and the court of appeals all constituted "*obiter dicta*." Respondents' brief at 30-31. This is simply incorrect. While petitioner concedes the ground for relief was not artfully worded in the habeas petition, it plainly alleged that petitioner's statement was obtained in violation of the Fifth, Sixth and Fourteenth Amend-

[7] In *Granberry*, this Court determined that the state's failure to timely assert a defense that the petitioner had failed to exhaust his available state remedies could result in waiver of the exhaustion requirement. The *Granberry* Court held that a reviewing court must make this determination using an interests of justice analysis. The interests of justice in this case compel a conclusion that the state has forfeited an opportunity to raise any argument—no matter how frivolous—that petitioner's *Edwards-Roberson* claim is procedurally barred. Certainly, the interests of justice do not permit respondents to participate for years in the merits litigation of a constitutional claim that strikes at the heart of the reliability of petitioner's conviction and sentence of death, and then, after foregoing all previously available opportunities, assert in this Court that every federal court which previously reviewed this case incorrectly reached the merits of petitioner's claim.

ments. Furthermore, the ground for relief was clearly understood to encompass a violation of the constitutional principles set forth in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), and related cases, by the federal magistrate, the district court, the panel of the court of appeals and the *en banc* court of appeals.

Had respondents genuinely believed that the *Edwards-Roberson* claim was defaulted in the state courts or not properly presented in the habeas corpus petition, their remedy was to object to the magistrate's report and recommendation when this issue was addressed in detail, and assert that it was *dicta*, or alternatively, that the claim was procedurally barred.[8] Similarly, they raised no objection in either the district court or the court of appeals, even though both courts (including the *en banc* court of appeals) addressed the issue in the precise manner in which it is now presented to this Court. *See* J.A. 119-123; 128-137. Furthermore, respondents did not maintain in their brief in opposition to the petition for writ of certiorari that petitioner's *Edwards-Roberson* claim was barred or otherwise not properly presented in the habeas corpus petition.[9] Respondents' failure to complain

[8] The failure to timely file objections to the magistrate's report and recommendation results in a waiver of any protestation of how that particular issue was resolved by the magistrate. *See Carr* v. *Hutto*, 737 F.2d 433 (4th Cir. 1984); *see also Thomas* v. *Arn*, 474 U.S. 140 (1985).

[9] Because the issue currently before this Court was clearly and accurately presented in the petition for writ of certiorari, and respondents failed to assert in their brief in opposition that the *Edwards-Roberson* claim was not properly preserved below, this Court should not now entertain this belated argument. *See City of Canton, Ohio* v. *Harris*, ____ U.S. ____, 109 S.Ct. 1197 (1989). In *Canton*, respondent argued for the first time in its brief that cer-

at every readily available and appropriate time that this issue was defaulted or not properly raised in the petition for writ of habeas corpus reveals not only the disingenuousness of respondents' argument, but also prevents them from raising this procedural defense now.[10]

II. THERE IS NO PRINCIPLED BASIS TO DISTINGUISH THE FACTS OF PETITIONER'S CASE FROM THOSE IN *EDWARDS* V. *ARIZONA* OR *ARIZONA* V. *ROBERSON*.

In the following section, petitioner replies to respondents' argument that this case is sufficiently distinguishable from *Edwards* and *Roberson* to require a different constitutional result. Initially, however, petitioner notes

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tiorari should be dismissed as improvidently granted because petitioner failed to preserve the question presented for review in the lower courts. This Court rejected respondents' assertion because the "Questions Presented in the petition for writ of certiorari encompass the issue before us in this case." 109 S.Ct. at 1202. Thus the Court concluded that because respondent did not object in its brief in opposition to the petition for writ of certiorari that "the same claim had not been pressed below," it would consider the question as to which certiorari was granted. *Id.* The same result is called for in this case.

[10] While respondents' brief is unclear on this point, they may also be asserting that this Court should not address the merits of petitioner's *Edwards-Roberson* claim because it was not properly pled in his federal habeas corpus petition. If this is respondents' assertion, then it is meritless in light of Federal Rule of Civil Procedure 15(b), which provides, in relevant part: "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they may be treated in all respects as if they had been raised in the pleadings." Thus a complaint, or habeas corpus petition, may be amended by implied consent if the matter is litigated on a particular legal theory without objection by either party. *See Curtis* v. *Loethen*, 415 U.S. 189 (1974); *Harris* v. *Nelson*, 394 U.S. 286, 294 n.5 (1969) (recognizing the applicability of F.R. Civ. P. 15(b) in habeas corpus proceedings).

that in the absence of a cross-petition for *certiorari*, the Court's consideration of this argument is discretionary, *see United States* v. *Nobles*, 422 U.S. 225, 241-42 n.16 (1975), and under the facts of this case should not be entertained. When a case is brought to the Court on a certiorari petition presenting solely an issue of retroactivity and not a question of substantive constitutional law, a practice of allowing the respondent to argue substantive constitutional grounds for affirmance without a cross-petition both strips the Court of control over what constitutional questions it should consider—a control that the certiorari jurisdiction was specifically designed to preserve—and foists upon this Court constitutional issues that it need not decide and therefore should not decide consistent with the fundamental "policy of strict necessity in disposing of constitutional issues." *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568 (1947); *see also Spector Motor Service, Inc.* v. *McLaughlin*, 383 U.S. 101, 105 (1944); *Parker* v. *Los Angeles County*, 338 U.S. 327, 333 (1949); *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 72 (1961).

Respondents present two reasons why there was no Fifth Amendment violation in this case. First, respondents assert that when petitioner retained an attorney to represent him as to the "unrelated" assault charge, and when he appeared with that attorney at a bond hearing, he was invoking only his Sixth Amendment right to counsel, and not his Fifth Amendment right. Respondents' Brief at 38-42. Thus, according to respondents, an invocation of the Fifth Amendment right to counsel can only occur in the context of a custodial interrogation. *See* Respondents' brief at 39-40. Second, respondents argue that because petitioner appeared with his attorney at a bond hearing after his arrest, but before the interrogation

which produced the incriminating statement, the requirements of *Edwards* and *Roberson* were satisfied. Respondents' brief at 45-52.

Before addressing each of respondents' contentions, it is important to review the circumstances under with petitioner was arrested and the statement was obtained. Petitioner was originally arrested on the evening of August 30, 1980, on an assault charge—later dismissed—which respondents characterize as "unrelated" to the murder which ultimately resulted in petitioners' conviction and sentence of death. The charge was unrelated, however, only in that it did not involve the same underlying offense as the murder. At the time of petitioner's arrest he was a prime suspect in the murder. The same officers who arrested petitioner for the assault were involved in the investigation of the murder of Pamela Lane, and they had been involved in the investigation since August 24, 1980. J.A. 28-29.[11] Despite this involvement, neither petitioner nor his attorney were informed of this fact when he was arrested, nor at any point prior to the interrogation which led to the incriminating statements involved in this case. *See* Petitioner's brief at 2-4.[12] Petitioner retained counsel, W. McAlister Hill, the next day. Late that evening, a bond hearing was held in conjunction with the assault charge. Petitioner and his counsel were present at the bond hearing. Petitioner was unable to make bond and was returned to the jail. Shortly after counsel left the jail, around

[11] One of the arresting officers, Eugene Frazier, was in charge of the Lane investigation. *Id.*

[12] Petitioner's counsel testified at the post-conviction hearing that he had no idea that petitioner was a suspect in the Lane murder until he was informed that the police had obtained incriminating statements from him. J.A. 65-66.

midnight, Officer Frazier, the same officer who arrested petitioner on the assault charge and who knew that petitioner had retained counsel on that charge, ordered that petitioner be brought to the interrogation room for questioning about the murder of Pamela Lane. Immediately upon being brought into the interrogation room, petitioner was informed that he was being charged with Ms. Lane's murder. J.A. 5. The officers involved in the interrogation were the same officers who arrested petitioner for assault the previous day. During the interrogation, which lasted most of the night, the police obtained two statements regarding petitioner's participation in the crime. Petitioner was not returned to his cell until approximately 10:30 a.m. the next day.

The record unequivocally reveals that petitioner's attorney, Mr. Hill, was not informed and had absolutely no idea that the police planned to interrogate his client that evening. Furthermore, and equally unequivocally, the record reveals that counsel had no idea that petitioner was a suspect in the Lane murder.

1. Petitioner Invoked The Right To Counsel.

Respondents assert that, at most, petitioner's decision to retain counsel to represent him in relation to the assault charge was an invocation of his Sixth Amendment right to counsel and not his Fifth Amendment right. This contention, however, was specifically rejected by this Court in *Michigan* v. *Jackson*, 475 U.S. 625, 633 (1986). In *Jackson*, the state asserted that the defendant's request for counsel at his arraignment should not be interpreted to mean that he desired the presence of counsel during any further police initiated questioning. 475 U.S. at 632. In response, this Court stated that it would give a "broad rather than a narrow interpretation to a defendant's

request for counsel." The Court reasoned that a lay person does not understand the difference between the Fifth and Sixth Amendment right to counsel, and thus "'should not be expected to articulate exactly why or for what purposes he is seeking counsel.'" 475 U.S. at 633 n.7 (quoting opinion of the Michigan Supreme Court); *see also Moran* v. *Burbine*, 475 U.S. 412, 420 (1986) (accused has invoked Fifth Amendment right to counsel and is not subject to further police initiated interrogation if he "indicates in any matter, at any time, prior to or during questioning" that he desires the assistance of counsel"); *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984) (same).[13] Thus, as petitioner affirmatively demonstrated his need for the "'guiding hand of counsel by retaining counsel,'" *see Escobedo* v. *Illinois*, 378 U.S. 478, 486 (1964) (quoting *Powell* v. *Alabama*, 287 U.S. 45, 69 (1938)), and appearing with counsel at the bond hearing prior to the police-initiated interrogation, no serious contention can be made that he did not invoke both his Fifth and Sixth Amendment rights to counsel. *See generally Arizona* v. *Roberson*, 108 S.Ct. 2093, 2096 (1988) (Fifth Amendment right to counsel invoked even though accused did not request counsel during a custodial interrogation). Both the district court and the court of appeals acknowledged as much in their opinions. J.A. 119-120; 129.

It is important to note that respondents are attempting to penalize petitioner for invoking the right to counsel at the earliest possible moment. Because petitioner retained counsel immediately after his arrest on the

[13] This is especially true in cases, such as this one, which involve a defendant with mental retardation. *See* A.B.A. Criminal Justice Mental Health Standards, *Competence and Confessions*, Standards 7-5.8 *et seq.*

assault charge, respondents seek on the basis of that fact alone to narrow the scope of the invocation. This is, as was noted previously, inconsistent with the reasoning utilized by this Court in *Michigan* v. *Jackson*. In respondents' view, the Fifth Amendment right to counsel can never be invoked unless an accused—even if he has previously had counsel appointed or has retained counsel—submits to custodial interrogation and reinvokes the previously asserted right. This hypertechnical construction of the Fifth and Sixth Amendments is contrary to the spirit of this Court's decisions interpreting a defendant's assertion of the right to counsel. *See Roberson*, 108 S.Ct. at 2096; *Moran* v. *Burbine*, *supra*, 475 U.S. at 420 (accused has invoked Fifth Amendment right to counsel and is not subject to further police initiated interrogation if he "indicates in any matter, at any time, *prior to* or during questioning" that he desires the assistance of counsel").

2. The Fact That Petitioner Met With His Attorney Prior To The Interrogation Is Irrelevant And Does Not Defeat Petitioner's Claim.

Respondents also assert that because petitioner had the opportunity to consult with his attorney at a bond hearing held in conjunction with the assault charge, the police were free to reinterrogate him. Respondents' argument relies on a phrase, taken out of context, from this Court's decision in *Edwards* v. *Arizona*, *supra*. The disputed language is as follows:

> We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversation with the police.

451 U.S. at 485. This passage from *Edwards* must be examined in the context of *Edwards'* antecedents, and of subsequent decisions clarifying the scope of the protections afforded by the Fifth Amendment. A review of these cases reveals that the language relied upon by respondents can only mean that after an accused invokes the right to counsel, the police cannot question him unless one of two prerequisites is satisfied: 1) the accused must initiate the interrogation; or, 2) the attorney must be notified of the interrogation and be present. *See Miranda*, 384 U.S. 436, 474 (1966) ("[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present"); *Escobedo* v. *Illinois*, 378 U.S. at 481 (same); *see also Moran* v. *Burbine*, 475 U.S. at 423 n.1 (acknowledging that *Edwards* holds that if accused asserts right to counsel that interrogation must cease until either accused initiates interrogation or until attorney is present); *Patterson* v. *Illinois*, ___ U.S. ___, 108 S.Ct. 2389, 2394 (1988) (same); *Roberson*, *supra*, 108 S.Ct. at 2097.

This is entirely logical. As the Court acknowledged in *Roberson*, the invocation of the right to counsel clearly indicates that the accused is unable to "cope with the pressures of custodial interrogation without counsel being present." *Arizona* v. *Roberson*, 108 S.Ct. at 2097. To sanction respondents' parsimonious construction of *Edwards* would run counter to the consistent theme of this Court's right-to-counsel cases, which is that having invoked the right to counsel, the accused is entitled to "rely on counsel as a 'medium' between him and the State." *Maine* v. *Moulton*, 474 U.S. 159, 176 (1985); *see also Michigan* v. *Jackson*, 475 U.S. at 634 n.1 (simple fact that accused asked for an attorney indicates that he does not believe himself "capable of dealing with adversaries singlehandedly"); *Patterson* v. *Illinois*, 108 S.Ct. at 2394

(the purpose of *Edwards* v. *Arizona* was to preserve the integrity of an accused's decision to deal with the policy *only through counsel*).

Respondents would undermine this principle. If respondents are correct, every time a defendant consulted with his attorney, the police then would be authorized to reinterrogate him in his attorney's absence. An accused would be penalized for invoking and exercising the right to counsel, since each consultation with his attorney would subject him to the very peril—custodial interrogation without the presence and assistance of counsel—that he has affirmatively indicated he is "unable to cope with." *Roberson*, 108 S.Ct. at 2100. This perverted interpretation of *Edwards* and *Roberson* cannot be the law, and must be rejected.

At the very least, the police cannot interrogate an individual who has invoked the right to counsel without informing his attorney of the interrogation and its purpose prior to initiating the interrogation. Without this knowledge, an accused cannot meaningfully consult with his attorney and decide whether to talk with the authorities.[14] *Roberson*, 108 S.Ct. at 2101 (accused, "hav-

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[14] Again, and not to belabor the point, this is especially important in a case involving a mentally retarded person such as petitioner. Petitioner's counsel, Mr. Hill, had previously represented petitioner in a civil matter, and thus counsel was well aware of petitioner's mental deficiencies. Hill testified that as a result of petitioner's retardation, Butler looked at Hill as an "authority figure" and "for guidance." *See* Joint Appendix filed in the United States Court of Appeals for the Fourth Circuit at 324-26. Counsel testified that he informed the police not to talk with Horace Butler. J.A. 65. While the police disputed counsel's statement, counsel's concern obviously arose, at least in part, as a result of petitioner's mental limitations. Certainly, had counsel had any idea that petitioner was suspected of committing a murder, he would have taken even greater precautions to protect Butler.

ing requested counsel, can determine how to deal with the separate investigations with counsel's advice"); *see also Satterwhite* v. *Texas*, 486 U.S. 249 (1988); *Estelle* v. *Smith*, 451 U.S. 454 (1981) (counsel must be notified of scope of state ordered psychiatric examination). In petitioner's case, the police did not inform petitioner's counsel that he was a suspect in a murder even though he was at the jail immediately prior to the interrogation. The record reveals that the police intentionally waited until counsel left, in order that they might interrogate petitioner without counsel's knowledge on another charge. This type of police conduct strikes at the heart of this Court's decisions in *Edwards* and *Roberson* and cannot be sanctioned. *See also Maine* v. *Moulton*, *supra*, 474 U.S. at 160 ("knowing exploitation by the state of an opportunity to confront the accused without counsel being present is as much a breach of the state's obligation not to circumvent the right to the assistance of counsel as to the international creation of such an opportunity").

III. *ARIZONA* V. *ROBERSON* IS NOT NEW LAW, BUT RATHER IS MERELY AN APPLICATION OF *EDWARDS* v. *ARIZONA* TO A SLIGHTLY DIFFERENT FACTUAL SITUATION.

Respondents assert that *Roberson*, *supra*, established a new rule of criminal procedure, which pursuant to this Court's decision in *Teague* v. *Lane*, ___ U.S. ___, 109 S.Ct. 1060 (1989), should not apply retroactively. Respondents argue that *Roberson* was "an extension of *Edwards* to separate investigations." Respondents' Brief at 62. Because it was the first decision of this Court to do so, respondents argue that *Roberson* established a new rule. *Id.* In the main, petitioner relies upon the retroactivity discussion contained in his opening brief. However, several points are worth noting here.

First, respondents' interpretation of this Court's decision in *Teague* would, if accepted, make every decision of this Court a "new rule" for retroactivity purposes. In short, respondents assert that if a case is factually distinguishable in any respect from prior precedent, then the application of that precedent would create a "new rule" of criminal procedure.

This radical view of *Teague* was rejected by all nine members of this Court in *Penry* v. *Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934 (1989). While the *Penry* Court divided over whether the application of *Lockett* v. *Ohio*, 438 U.S. 586 (1978) in Penry's case involved a new rule of law, all members of the Court generally agreed that the determination of whether a case involved a new rule for retroactivity purposes must be made in light of the principles established by Justice Harlan in his separate opinions in *Mackey* v. *United States*, 401 U.S. 667, 690-95 (1971), and *Desist* v. *United States*, 394 U.S. 244, 263 (1969). *See Penry*, 109 S.Ct. at 2945; 2964. In those opinions, Justice Harlan affirmatively stated that a case does not create a new rule if it has "'simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.'" *Mackey*, *supra*, 401 U.S. at 695 (quoting *Desist* v. *United States*, 394 U.S. 244, 263 (1969) (Harlan J., dissenting)). As Justice Harlan recognized in *Desist*, "one need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation." 394 U.S. at 264.

As was set forth in detail in petitioner's opening brief at 9-17, *Roberson* did not create a new rule of criminal pro-

cedure. Rather, it was merely an application of *Edwards* v. *Arizona* to a slightly different set of facts. Any other conclusion would be inconsistent with the retroactivity principles delineated in *Teague* v. *Lane*, *supra*, and other retroactivity decisions of this Court. *See also Yates* v. *Aiken*, 484 U.S. 211, 216 (1988) (*Francis* v. *Franklin*, 471 U.S. 307 (1985), did not announce a new rule of law but was "merely an application of the principle that governed out decision in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979)"); *Truesdale* v. *Aiken*, 480 U.S. 427 (1987) (per curiam) (reversing a decision of the Supreme Court of South Carolina that denied retroactive effect to *Skipper* v. *South Carolina*, 476 U.S. 1 (1986), and implicitly holding that *Skipper* did not create a new rule of law but only applied the Eighth Amendment principle of *Lockett* v. *Ohio*, *supra*, to a different fact situation).

CONCLUSION

For the foregoing reasons, and for those set forth in petitioner's opening brief, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed and petitioner's case should be remanded with instructions to grant the writ of habeas corpus.

Respectfully submitted,

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